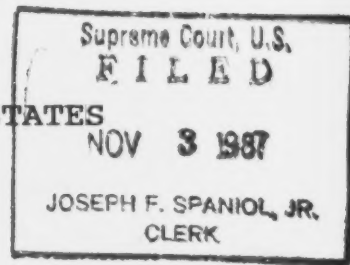


87 - 737 (1)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 19



NO. A-256

NICHOLAS R. PIZZITOLO,

Petitioner

- VERSUS -

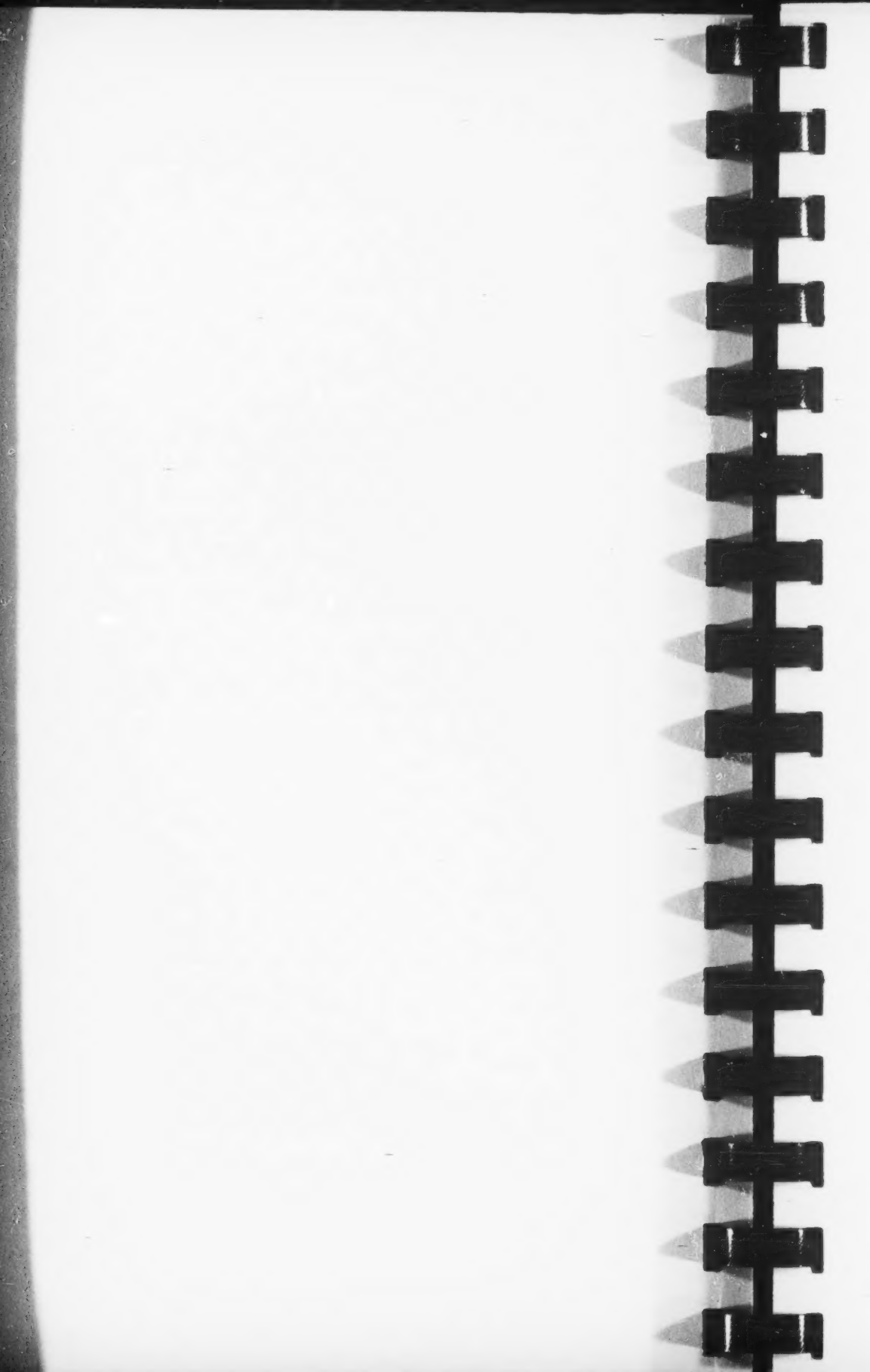
ELECTRO-COAL TRANSFER CORPORATION and
NATIONAL UNION FIRE INSURANCE COMPANY,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

FERDINAND J. KLEPPNER
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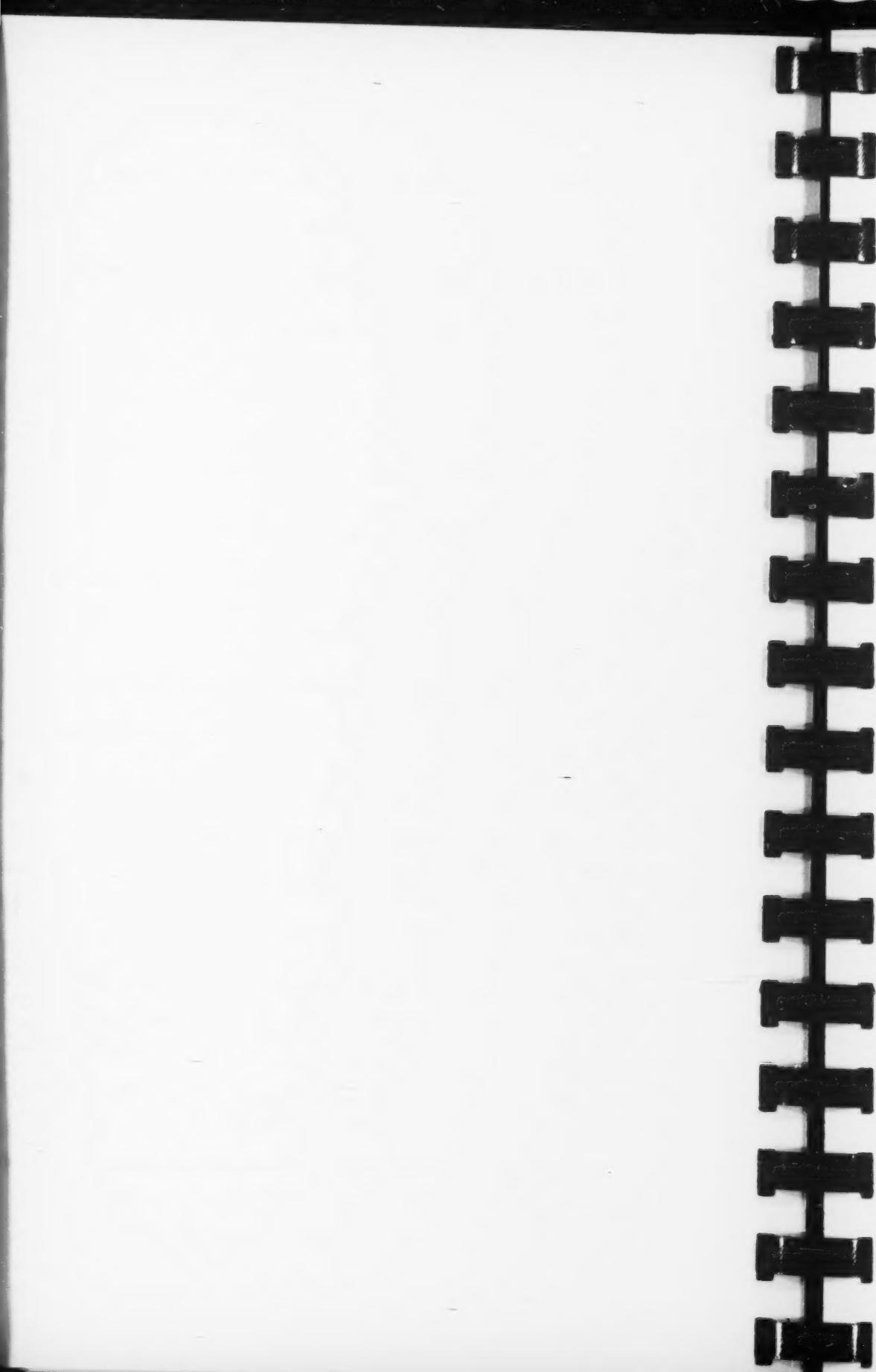
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ELECTRO-COAL TRANSFER CORPORATION,

Respondent.

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FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Fifth Circuit properly interpreted the Longshore and Harbor Workers Compensation Act (LHWCA) in holding that the LHWCA unqualifiedly bars any injured plaintiff who repairs ships from eligibility as a member of the ship's crew under any and all circumstances, as a matter of law, eliminating any jury determination of whether the "member of a ship's crew" exception applies, despite repeated declarations by the United States Supreme Court that a determination of crew member status must be entrusted to a jury.

2. Whether a properly instructed jury's unanimous verdict that the petitioner, an electrician who repaired and maintained the electrical systems of

an identifiable fleet of vessels in navigation, was a Jones Act seaman, may properly be set aside because the Trial Judge, although a reasonable evidentiary basis existed for the jury's finding, disagreed with the jury's conclusion on the facts that petitioner was more or less permanently assigned to an identifiable fleet of vessels.

LIST OF ALL PARTIES

NICHOLAS R. PIZZITOLLO-
Plaintiff in original
proceeding, Petitioner before
this Court.

ELECTRO-COAL TRANSFER
CORPORATION - Defendant in
original proceeding, Respondent
before this Court.

NATIONAL UNION FIRE INSURANCE
COMPANY - Intervenor in
original proceeding.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 19

NO.: A-256

NICHOLAS R. PIZZITOLO,
Petitioner

-VERSUS-

ELECTRO-COAL TRANSFER CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL, FIFTH CIRCUIT

Petitioner, NICHOLAS R. PIZZITOLO, respectfully seeks certiorari to the Court of Appeal for the Fifth Circuit for review of that Court's affirmation of a Judgment of the District Court granting a Judgment Notwithstanding the Verdict reversing a unanimous verdict of the trial jury that petitioner was a Jones Act Seaman when injured.

OPINIONS BELOW

1) Decision of the United States Court of Appeal for the Fifth Circuit, **Pizzitolo vs. Electro-Coal Transfer Corporation**, 812 F.2d 977 (5 Cir. 1987). (Appendix "A").

2) Judgments and Reasons therefor granting a Judgment Notwithstanding of the Verdict by the Judge of Division "D", United States District Court for the Eastern District of Louisiana, dated December 11, 1985. (Appendix "B").

3) Unanimous verdict of the Trial Jury that petitioner was a Jones Act Seaman; that his injuries were caused by the negligence of respondent, and, that petitioner was not contributorily negligent. (Appendix "F").

JURISDICTION AND GROUNDS FOR PETITION

1) Jurisdiction of this Court to review prior Judgments on Certiorari is invoked under 28 U.S.C. 1254(1).

2) The Judgment of the Court of Appeal for the Fifth Circuit sought to be reviewed herein was dated March 20, 1987, and a Petition for Rehearing and Suggestion for Rehearing En Banc filed by petitioner were denied by that court on July 7, 1987.

3) The Trial Court's entry of Judgment Notwithstanding of the Verdict was dated December 11, 1985.

4) This Court granted a Motion for Extension of Time within which to petition for certiorari on September 29, 1987, extending the time for filing of that petition to and including November 4, 1987.

STATUTES AND ORDINANCES

1) 33 U.S.C. Section 902(3)

Definitions:

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include --

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer

described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

2) 46 U.S.C. Section 688(a):

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result

of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

Petitioner, an employee of ELECTRO-COAL TRANSFER CORPORATION, sued under the Jones Act (46 U.S.C. 688(a)) for bodily injuries sustained when he fell from a scaffolding. Petitioner was an electrician.

NATIONAL UNION FIRE INSURANCE COMPANY intervened seeking recovery of compensation benefits paid to petitioner, should petitioner be decreed to have been a seaman at the time of his accident.

On August 29, 1984, respondent (defendant below) sought Summary Judgment to dismiss the complaint. The Trial Judge denied that motion.

At a trial on the merits, limited to the issue of liability, the jury was charged to reach conclusions on the following issues: (1) whether Nicholas

Pizzitolo was a seaman; (2) whether Electro-Coal Transfer Corporation was negligent; and (3) whether Nicholas Pizzitolo was contributorily negligent. Following the trial, but before a jury verdict, the defendant motioned for a directed verdict. The Trial Judge declined to act on that motion and allowed the matter to go to the jury.

The jury rendered a unanimous verdict in favor of plaintiff and against defendant, finding that plaintiff was a seaman, that the defendant was negligent, and that plaintiff was not contributorily negligent. Subsequent thereto, on motion of the defendant, the Trial Court reversed the jury's verdict and entered a Judgment Notwithstanding the Verdict in favor of **ELECTRO-COAL TRANSFER CORPORATION** dismissing Pizzitolo's

complaint at his cost. (A subsequently filed Motion to Amend Order and Reasons for Judgment seeking a decision of the Trial Judge on the issue of negligence, filed by the defendant was denied by the Trial Court).

The United States Court of Appeal for the Fifth Circuit affirmed the decision of the Trial Judge and held that "ship repairers", in all circumstances, are ineligible for consideration as members of a crew of a vessel. The court effectively ruled that regardless of the particular circumstances of a case the crew member status determination required as a result of the exception found in Section 902(3)(G) of the Longshore and Harbor Workers Act is no longer applicable in cases where an individual is merely named a "ship repairman" and,

therefore, crew member status may not be submitted to a jury.¹

NICHOLAS PIZZITOLO, a senior electrician, with his crew of electricians, were the only personnel charged with the maintenance and repair of all electrical systems aboard a specific identifiable fleet of electrically dependent harbor tugs owned and operated by respondent, ELECTRO-COAL TRANSFER CORPORATION. (Appendix G-1

through G-9; G-16; G-43 through G-45; G-50; G-56 through G-57; G-64 through G-65; G-67 through G-70; G-82; G-96

¹ Over Pizzitolo's strenuous objection, the Court of Appeals apparently allowed Electro-Coal to "cross-appeal" the district court's denial of its Motions for Directed Verdict and JNOV on the negligence issue. Pizzitolo, 812 F.2d 977, 979.

through G-97). In addition to the sole and exclusive responsibility for electrical maintenance and repair of the harbor tugs, Pizzitolo and his crew were solely and exclusively responsible for the electrical work required and maintenance of electrical systems aboard specifically identifiable river tugs known as "big white boats" when they were operating in the New Orleans area. In addition, he and his electrical crew had sole and exclusive responsibility for all electrical repairs and maintenance of electrical systems aboard a specific and identifiable fleet of barges and ocean-going barges and tugs owned and operated by respondent. (Appendix G-12 through G-14; G-16 through G-23; G-47 through G-49; G-53 through G-54; G-57 through G-64; G-68 through G-69; G-72 through G-

76; G-98 through G-99).

Trial testimony established that Pizzitolo and his electrical crew were called upon to perform electrical repair and maintenance aboard an additional identifiable fleet of vessels owned by a sister corporation to Electro-Coal. (Appendix G-72 through G-73).

The maintenance and repair of electrical systems aboard the Electro-Coal fleet was considered top priority among all other electrical tasks which petitioner was called upon to perform. On occasions, these electricians, including petitioner, ate their meals aboard vessels upon which they were working; they routinely were required to perform maintenance and repair work while vessels were under way. At all times the electrical work performed by petitioner

and his crew was aboard vessels while afloat and while they were, according to traditional interpretations, in navigation. (Appendix G-24 through G-27; G-56 through G-57; G-67 through G-68; G-70; G-74; G-76; G-92 through G-94).

Pizzitolo's work aboard the Electro-Coal tugs and barges was similar to that of the captains and deckhands who operated these tugs and barges in that all worked a specific shift, following which they left the vessels to sleep and eat at home. (Appendix G-38; G-55; G-65 through G-66; G-95 through G-96).

On numerous occasions, a boat captain would directly request that Pizzitolo or one of his crew perform the electrical work aboard his vessel. (Appendix G-77 through G-78). Pizzitolo performed maintenance and repair work

Electro-Coal fleet on an average of eight to ten hours per week throughout his entire career with the company. (Appendix G-31 through G-32). In one particular year (1981), Pizzitolo worked for a period of twenty-five to thirty days aboard a floating barge and, in addition, made trips thereafter for maintenance and repair on that barge. (Appendix G-34 through G-37).

The basis for jurisdiction of this Jones Act (46 U.S.C. 688) matter in the court of first instance, that is, the United States District Court for the Eastern District of Louisiana, was the general federal question statute, 28 U.S.C. 1331.

ARGUMENT

This court should grant petitioner's Request for a Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit because that court has interpreted the Longshore and Harbor Workers Compensation Act (LHWCA) as unqualifiedly barring any injured plaintiff who repairs ships from eligibility as a member of the ship's crew under any and all circumstances, without any preliminary factual determination as to whether that individual is a "member of the crew of any vessel" within the meaning of 33 U.S.C. 902(3)(G). The Court of Appeal declared that "ship repairers" are unqualifiedly covered by the LHWCA and they are, as a matter of law, ineligible for consideration as seamen or members of

the crew of a vessel. The court added that "even if he (petitioner) spent a substantial portion of his work time aboard a recognized fleet of vessels performing electrical repairs... he is covered by the LHWCA and cannot qualify as a seaman within the meaning of the Jones Act." Pizzitolo v. Electro-Coal Transfer Corporation, 812 F.2d 977, 983 (5 Cir. 1987).

Initially, the court must consider that the matter before this court does not involve an individual who has been denied benefits under the Longshore and Harbor Workers Compensation Act. Instead, it involves an individual who, from the outset, sought his remedy for injuries under the Jones Act, as a seaman. This court has long stressed a policy of deference to the trier-of-

fact's findings on issues of crew member status, and expressly indicated that it was concerned with LHWCA coverage, not Jones Act coverage. Robertson, "Current Problems in Seaman's Remedies: Seaman Status, Relationship Between Jones Act and LHWCA, and Unseaworthiness Actions by Workers Not Covered by LHWCA", 45 La. Law Rev. 875, 878 (1985); See also, South Chicago Coal and Dock Company v. Bassett, 309 U.S. 251, 60 S.Ct. 544 (1940) and Norton v. Warner Company, 321 U.S. 565, 64 S.Ct. 747 (1943).

The significance of this point is that the Court of Appeals, in the decision under challenge, has ignored and virtually eliminated the LHWCA's "member of a crew of any vessel" exception. Instead, its analysis is confined to a semantical distinction as to whether

petitioner's generic trade, which involved electrical repairs to vessels in navigation, constitutes an "occupation" covered exclusively under the Longshore and Harbor Workers Act. It is submitted to this court that the Court of Appeals' analysis begs the question. The explicit language of the Act itself establishes an exception to coverage for "member of a crew of any vessel". Nothing in the act's legislative history suggests that Congress intended this exception to be confined to an analysis only in particular factual circumstances. With respect to the 1972 amendment to LHWCA, House Report No. 92-1441's section-by-section description of Committee Amendment to the Bill indicates that the new subsection retained the crew member's exclusion and merely states that the term

"employee" includes any longshoreman or other person engaged in longshoring operations, and any harbor workers (including any ship repairman, shipbuilder, and shipbreaker). P.L. 92-576, 1972 U.S. Code Cong. and Adm. News, p. 4711. Fundamental logic requires, therefore, that a determination be reached initially as to whether the party under consideration falls within the exception. Obviously, if he does, no further analysis of the Longshore and Harbor Workers Compensation Act would be in order.

The landmark decisions of this court reveal its clear direction with regard to the issue of crew member status to include the following principles:

(1) It is proper to submit the issue to the jury in almost all cases,

and,

(2) A worker should not be excluded from crew member status as a matter of law if he had a permanent connection with or performed a significant amount of work aboard a vessel in navigation and his duties contributed to the vessel's operation, maintenance, or mission. Desper v. Starved Rock Ferry Company, 342 U.S. 187, 72 S.Ct. 216 (1952); Norton v. Warner Company, 321 U.S. 565, 64 S.Ct. 747 (1943); Senko v. LaCrosse Dredging Corporation, 352 U.S. 370, 77 S.Ct. 415 (1957); Gianfala v. Texas Company, 350 U.S. 879, 76 S.Ct. 141 (1955); Grimes v. Raymond Concrete Piling Company, 356 U.S. 252, 78 S.Ct. 687 (1958); Butler v. Whiteman, 356 U.S. 271, 78 S.Ct. 734 (1958).

In direct contradiction of these

requirements as expressed by this court, the Court of Appeals for the Fifth Circuit has interpreted the Longshore Harbor Workers Compensation Act to preclude altogether a jury determination of crew member status for an injured individual whose occupation is labeled "repairman".

The inescapable conclusion resulting from the appellate court's reasoning is that a repairman (such as an electrician, motorman, mechanic, etc.) whose duties involve the repair of ships in navigation, even if they are aboard those ships as part of the ship's complement, over extended voyages, must be unqualifiedly covered under the Longshore and Harbor Workers Compensation Act and whether or not he is "a crew member of any vessel" may never be

submitted to the trier of facts for determination.

Petitioner suggests to this court that the Fifth Circuit Court of Appeal has grievously misinterpreted the Longshore and Harbor Workers Compensation Act. The extent of that misinterpretation is glaringly illustrated in the following language:

The only work Pizzitolo performed aboard vessels was electrical repair work. Even if he spent a substantial portion of his work time aboard a recognized fleet of vessels performing electrical repairs, for reasons above he is covered by the LHWCA and cannot qualify as a seaman within the meaning of the Jones Act. Pizzitolo, 812 F.2d 977, 983.

The appellate court has declared, therefore, that henceforth a factual determination of seaman status in a matter in which a plaintiff seeks benefits under the Jones Act will be

eliminated for any petitioner whose work involves electrical repairs to a vessel.²

In the case before the court, the properly instructed jury's unanimous verdict that petitioner, an electrician, was a Jones Act seaman, was improperly set aside because the Trial Judge disagreed with the jury's conclusion on the facts. A review of those facts reveals that a reasonable jury could arrive at the verdict which was reached in this case. A reasonable evidentiary basis supported the jury's conclusion. Wallace v. Oceaneering International, 727 F.2d 427, 432 (5 Cir. 1984); Boeing v.

² It is important to note that the Court of Appeals completely refused to comment on Mr. Pizzitolo's permanent assignment to a fleet of vessels in navigation, the prong of the Robison test which plaintiff argued in his briefs and in oral argument.

Shipman, 411 F.2d 365, 370 (5 Cir. 1969)
(en banc).

The Court of Appeals for the Fifth Circuit, in a landmark case, Offshore Company v. Robison, 266 F.2d 769, 779 (5 Cir. 1959), established the test for determining seaman/crew member status. This test has become a model in other circuits and has apparently been approved by this court. Known as the "two prong" test, the court concluded that an evidentiary basis for a Jones Act seaman determination to go to a jury exists if: (1) there is evidence that the injured workman was assigned permanently to a vessel or fleet of vessels or performed a substantial part of his work on the vessel; and (2) his work or duties contributed to the function of the vessel or to the accomplishment of its mission

or to the operation or welfare of the vessel in terms of its maintenance during movement or during anchorage for future trips. The Pizzitolo jury was fully instructed in accordance with the criteria outlined, and no substantial objections to those instructions were offered.

The evidence presented at trial is clear to the effect that Nicholas Pizzitolo was regularly and routinely assigned to a specific and identifiable fleet of harbor tugs for the purpose of maintenance and repair of the electrical systems of those vessels. (Appendix G-1 through G-9; G-16; G-43 through G-45; G-50; G-56 through G-57; G-64 through G-65; G-67 through G-70; G-82; G-96 through G-97). Petitioner and his crew solely and exclusively maintained the

electrical equipment on the harbor boats and on the river tugs when they were in the New Orleans area. (Appendix G-3 through G-4; G-16 through G-17; G-50; G-64 through G-66). Additionally, he and his electrical crew solely and exclusively maintained the electrical systems aboard respondent's barges. (Appendix G-18 through G-22). Each and every one of these vessels and barges was named for the record. (Appendix G-2; G-12; G-17 through G-18; G-48 through G-49; G-51; G-53; G-56; G-59; G-68; G-72 through G-73; G-82; G-97). In addition, petitioner was frequently assigned to maintain and repair electrical systems aboard vessels owned by respondent's sister companies. (Appendix G-57 through G-59; G-72 through G-73).

Petitioner's work was not incidental and sporadic. Instead, it was essential to the functioning of the vessels to which he was assigned. (Appendix G-3 through G-9; G-68 through G-70). The harbor tugs especially were "totally electrically dependent". (Appendix G-3 through G-9). Moreover, the work which petitioner performed was not an isolated portion of his total work history with respondent corporation. Instead, it was consistent throughout his entire twelve year employment history with the company. (Appendix G-7 through G-9).

Unlike a dry dock ship repairman for whom the LHWCA was fashioned to protect, Mr. Pizzitolo faced the hazards and perils of the sea as he performed his electrical work abroad Electro-Coal's fleet of vessels. It was incorrect to

characterize Mr. Pizzitolo as a "ship repairman" as envisioned by Congress in its definition of "employee" in the LHWCA. See 33 U.S.C. 902(3). All of the vessels to which petitioner was assigned for electrical purposes were owned either by Electro-Coal Transfer Corporation (respondent), or were operated by one of respondent's sister companies. This fact was clearly established throughout the testimony of Mr. Pizzitolo and that of other witnesses and was never contradicted by any defense witness. (Appendix G-1 through G-2; G-12 through G-13; G-17 through G-18; G-47 through G-54; G-68; G-72 through G-73; G-82; G-97 through G-98).

The electrical systems upon which petitioner and his crew worked involved essential items, without which the

vessels could not function. (See e.g. Appendix G-69). These included equipment such as wenches, lighting, generators, fuel measurement devices, sensing units and starters for diesel engines. (Appendix G-1 through G-2; G-28 through G-30; G-82 through G-92). It is especially significant to note that the policy of Electro-Coal was that the vessels were "top priority" and their repair and maintenance took precedence over all other electrical tasks required of the crew. (Appendix G-24 through G-26). No other personnel assigned to the harbor tugs or the barges or, in fact, to the river tugs, were charged with the repair and maintenance of electrical systems. (Appendix G-22 through G-23; G-50).

Petitioner's regular duties required

that he spend whatever time was necessary to repair and maintain the vessels' electrical systems. There were times when these duties required that he spend a series of three or four days and, on occasion, to eat meals aboard vessels. (Appendix G-26 through G-27; G-66; G-76). In addition, Mr. Pizzitolo testified that he spent as much as two weeks aboard a series of vessels in maintaining and improving their electrical systems. On one vessel, in particular, "CARGO ONE", Pizzitolo spent twenty-five to thirty days installing lighting. (Appendix G-32 through G-33).

Numerous times the master of a vessel would call upon an electrician directly to correct electrical problems. (Appendix G-77 through G-78). Requests for repair and maintenance of vessels in

question originated with the vessels' master. (Appendix G-81). It is significant that petitioner was required routinely to perform his tasks aboard these vessels while they were afloat and/or while they were under way. (Appendix G-57; G-70; G-79 through G-80; G-92 through G-94). Thus, this case does not involve the traditional or classic ship repairer or shipbuilder working in a dry dock setting. Instead, petitioner was exposed to the hazards and perils of the sea in the classic sense of a seaman. (See, e.g. Appendix G-70 through G-71; G-79 through G-80). Importantly, the master and deckhands aboard the harbor and river vessels that petitioner repaired and maintained, like Mr. Pizzitolo, returned home in the evenings and slept ashore. (Appendix G-

55; G-65 through G-66; G-95 through G-96). Thus, as in Senko v. LaCrosse Dredging Corporation, Supra, the shift-type characteristics of petitioner's employment are not significant to his status as a seaman.

The jury's obvious conclusion that the duties of Mr. Pizzitolo and his electrical crew as the vessels' electricians were part of their permanent work assignment and contributed to the ultimate operation of each of those vessels was amply supported by the evidence. (See, e.g. Appendix G-1 through G-2; G-6 through G-37; G-43 through G-52; G-53 through G-54; G-56 through G-64; G-64 through G-67; G-82 through G-94; G-96 through G-99).

Electo-Coal's primary function of transporting coal by water, coupled with

the sole and exclusive responsibility for repair and maintenance of vital electrical systems which belonged to petitioner and his crew, unequivocally demonstrate that the capacity of Mr. Pizzitolo's employment as the electrical crewman aboard harbor vessels, barges and river tugs, contributed to the functioning of those vessels, their mission, their operation and their welfare. Robison, 266 F.2d 769, 779. This fact presents a reasonable evidentiary basis for the jury's verdict of seaman status which was based upon petitioner's permanent assignment to an identifiable fleet of vessels.

In discussing the role of the trier of fact (in this case, the jury), in connection with a determination of seaman status, in Senko v. LaCrosse Dredging

Corporation, Supra, this court declared that:

Our holding there (in South Chicago Company v. Bassett) that the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate. (Parentheses Added). Senko, 352 U.S. 370, 374.

In the instant proceeding, the Trial Judge had been presented with a Motion for Summary Judgment and a Motion for Directed Verdict prior to submission of this matter to a jury. In both situations, the Trial Judge declined to rule in favor of the moving party, thus suggesting that even in his opinion, a reasonable factual basis for the exercise

of the jury's discretion had been established. Nevertheless, following a unanimous jury verdict in favor of petitioner, the trial court attempted to explain its reversal of that jury's verdict with these significant words:

In this case, I find the evidence is overwhelming that the plaintiffs' duties aboard the vessels were not substantial but merely transitory or sporadic and plaintiff's relationship to the vessels lacked the permanency required by Robison. On those occasions when the plaintiff was required to work on a vessel, he would be on the vessel only for the purpose of performing some specific electrical repair and once the repair was accomplished, the plaintiff would leave the vessel and return to the electrical shop for his next assignment which, more often than not, would be shoreside in the plant and completely unrelated to any vessel activity. Accordingly, plaintiff has failed to satisfy the first prong of the Robison test and, therefore, may not be classified as a seaman.

(Appendix B-6, B-7).

The Trial Judge's Reasons for Judgment constitute more of an argument for a position than reasons for judgment. In short, these "reasons" are, in reality, his argument for a view different from that of the jury. In effect, the Trial Judge substituted his views of the facts for those of the jury. He became one of the jurors whose vote, as a practical matter, outweighed all of the votes of the other jurors. This court has repeatedly rejected that approach to the determination of seaman status.

The Fifth Circuit's own recognition of the durability of the Robison test appears in its opinion in Barrett v. Chevron, USA, Inc., 781 F.2d 1067 (5 Cir. 1986). In an analysis, the Barrett

court declared:

These varying formulations reflect the principle that the permanent-attachment aspect of the crew member status determination, like the status determination as a whole, is an inherently factual question, and, as our cases since Robison make clear, it is generally a question for the fact-finder... In most cases, the facts and inferences to be drawn from them may lead to either decision by the factfinder, for the Robison test is inherently factual, and, like all applications of a legal standard to widely-varying factual situations, may inevitably result in some inconsistent determination of status. The Supreme Court, which Robison followed, accepts these inconsistencies. The Supreme Court has signalled no disapproval of Robison and we continue to follow it. Barrett, 781 F.2d 1067, 1074.

It is submitted that the question before the court is not whether the facts, as presented, constitute Mr. Pizzitolo as a seaman, but whether they support a jury finding that he is one.

See, Kimble v. Noble Drilling Corporation, 416 F.2d 847, 849 (5 Cir. 1969). As in Desper, Norton, Senko, Gianfala, Grimes, and Butler, the present case falls within the province of the jury because there is evidence that petitioner was assigned permanently to a fleet of vessels for maintenance and repair of their electrical systems and equipment while those vessels were in navigation. More than ample evidence existed that petitioner's duties contributed to the normal functioning of these vessels.

CONCLUSION

The decision of the United States Court of Appeal is far reaching in its effects. The appellate court has undertaken a novel and unfounded

interpretation of the seaman's exclusion contained in the Longshore Harbor Workers Compensation Act. That interpretation constitutes, in effect, its removal for determination from the trier of fact, the jury. The Court of Appeal has cast a narrow and concentrated gaze upon the labels "shipbuilding" and "ship repairing", excluding therefrom any consideration of the facts and circumstances surrounding the employment activities of each petitioner before the court. Thus, the Court of Appeals, has made a broad and general pronouncement on the law which, if allowed to stand, will exclude from the protections afforded by the law to seaman vast numbers of those who regularly face the hazards and perils of the sea while maintaining and repairing electrical and mechanical

systems of vessels in navigation. It is submitted to this court that such was not the intention of the United States Congress in its enactment of the Longshore and Harbor Workers Compensation Act nor of this court in interpreting the Jones Act and the Longshore Harbor Workers Compensation Act. For these reasons, this court should grant petitioner's request for certiorari to the United States Court of Appeals for the Fifth Circuit.

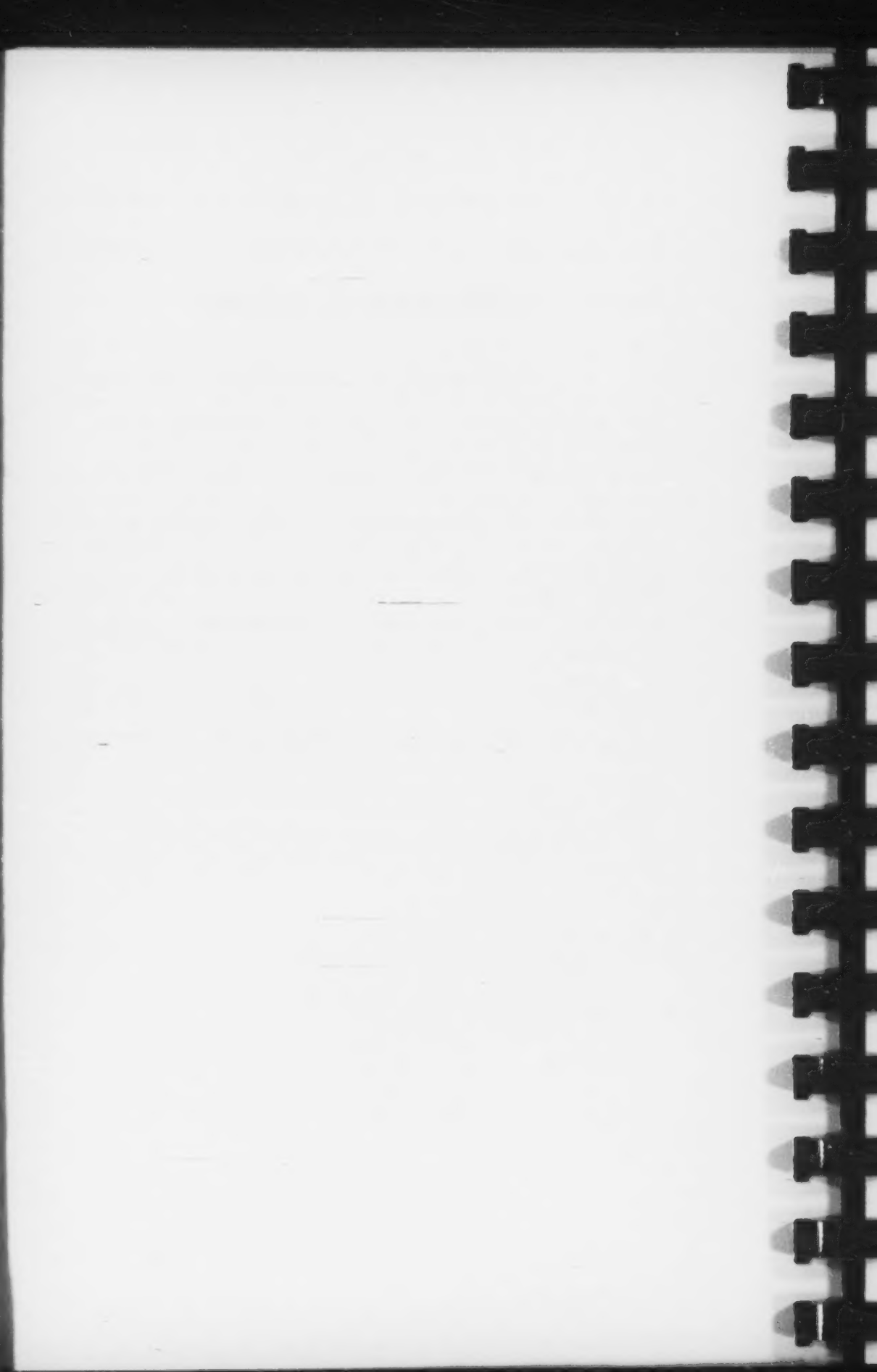
Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ferdinand J. Kleppner, Attorney for Petitioner, do hereby certify that I have served three copies of this Petition for Writ of Certiorari, with accompanying Appendices, upon each interested party herein, this 4th day of November, 1987.

FERDINAND J. KLEPPNER



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 19

NO. A-256

NICHOLAS R. PIZZITOLO,
Petitioner

- VERSUS -

ELECTRO-COAL TRANSFER CORPORATION,
Respondent.

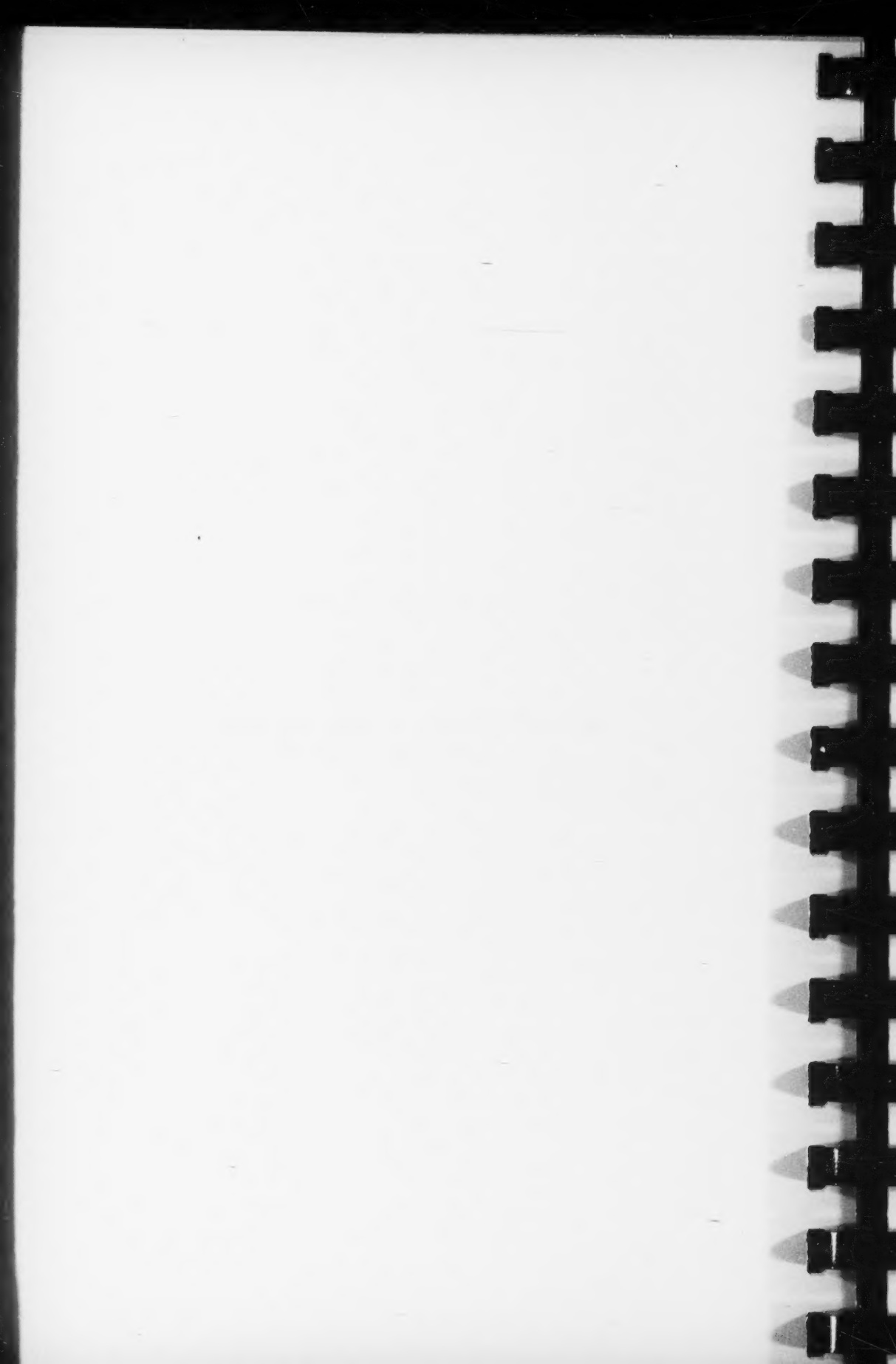
APPENDIX FOR
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

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APPENDIX "A"

OPINION

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT



[977]

PIZZITOLO v. ELECTRO-COAL TRANSFER CORP.
Cite as 812 F.2d 977 (5th Cir. 1987)

Nicholas R. PIZZITOLO,
Plaintiff-Appellant,

and

National Union Fire Insurance Company,
Intervenor-Appellant,

v.

ELECTRO-COAL TRANSFER CORPORATION,
Defendant-Appellee.

No. 86-3006.

United States Court of Appeals,
Fifth Circuit.

March 20, 1987.

Employee performing electrical repair work aboard coal vessels filed action against employer to recover damages under Jones Act for personal injuries sustained in course of employment. The United States District Court for the Eastern District of

Louisiana, A. J. McNamara, J., entered judgment for employer notwithstanding jury verdict for employee on issue of seaman status, but refused to grant directed verdict or judgment notwithstanding verdict on issue of sufficiency of evidence. On appeal and cross appeal, the Court of Appeals, W. Eugene Davis, Circuit Judge, held that employee was not "seaman" under Jones Act as he belonged to occupation enumerated under Longshore and Harbor Workers' Compensation Act and latter act was his exclusive remedy even if he spent substantial portion of work time aboard vessels.

Affirmed.

1. Seamen 29(5.1)

Shipping 86(1)

Workers' Compensation 2085

Coverage under Jones Act and Longshore and Harbor Workers' Compensation Act is mutually exclusive, and workman engaged in occupation for which coverage is expressly provided under latter is ineligible for benefits under former. Jones Act, 46 U.S.C.A. Section 688; Longshore and Harbor Workers' Compensation Act, Section 2(3), as amended, 33 U.S.C.A. Section 902(3).

2. Seamen 2

Shipping 86(1)

Workers' Compensation 260

Employee who spent approximately 75 percent of his work time maintaining and repairing shore-based electrical machinery and other 25 percent of his work time replacing or repairing electrical equipment on vessels owned by coal transfer company was not "seaman"

within meaning of Jones Act; even if employee spent substantial portion of his work time aboard vessels, he was engaged in occupation enumerated under Longshore and Harbor Workers' Compensation Act, which was his exclusive remedy. Jones Act, 46 U.S.C.A. Section 688; Longshore and Harbor Workers' Compensation Act, Section 2(3), as amended, 33 U.S.C.A. Section 902(3).

See publication Words and Phrases for other judicial constructions and definitions.

Ferdinand J. Kleppner, Victor A. Marsiglia, Jr., Metairie, La., for plaintiff-appellant.

Lance S. Ostendorf, New Orleans, La., for National Union Fire Ins. Co.

John O. Charrier, Jr., Jeanmarie

LoCoco, New Orleans, La., for defendant-appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GARZA, DAVIS and JONES, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Pizzitolo filed this action against his employer, Electro-Coal Transfer Corp. (Electro-Coal), to recover damages under the Jones Act for personal injuries he suffered in the course of his employment. Following a trial, the jury returned a verdict for Pizzitolo but the district court granted Electro-Coal's motion for judgment notwithstanding the verdict. The district court concluded that Pizzitolo was not a seaman and his exclusive remedy against his employer was

provided by the Longshore and Harbor Workers' Compensation Act (LHWCA). We affirm.

I.

FACTS

Electro-Coal owns and operates a coal terminal on the west bank of the Mississippi River near Davant, Louisiana. The terminal consists of shoreside buildings, a coal storage area and a dock. Electro-Coal routinely transfers coal from vessel-to-vessel and between vessels and the shoreside storage area.

Barges bringing coal to Electro-Coal are ordinarily tied to the dock adjacent to the terminal. This coal is then either loaded onto other barges, on seagoing vessels or is stored at the terminal for later loading. The vessels are loaded and unloaded by large electric

powered cranes and a series of electric powered conveyor belts. Electro-Coal owns and operates four harbor tugs and a crane barge to load, unload and otherwise assist vessels calling at its terminal. A sister corporation owns twelve oceangoing tugs and barges that regularly call at the Davant terminal.

Pizzitolo is employed by Electro-Coal as an electrician. He works a standard forty-hour week. When he arrives for work in the morning he reports to the shore-based electrical shop where he receives an assignment from one of his foremen. When he finishes that assignment, he returns to the shop for a new one.

Pizzitolo spent approximately 75% of his work time maintaining and repairing the shore-based electrical machinery.

The other 25% of his work time was spent replacing or repairing electrical equipment on vessels owned by Electro-Coal and its sister company while the vessels were tied up at the terminal dock.

At the time of his injury, Pizzitolo was standing on a scaffold board above the river, repairing one of the conveyors used to load and unload vessels. The scaffold board on which he was standing broke and he fell into the river.

Pizzitolo filed this suit against Electro-Coal seeking damages as a seaman under the Jones Act for injuries he suffered in the accident. During the liability phase of the bifurcated jury trial, three issues were presented to the jury: (1) whether Pizzitolo was a seaman and thus eligible to recover

damages under the Jones Act; (2) whether Electro-Coal was negligent; and (3) whether Pizzitolo was contributorily negligent. The jury answered questions (1) and (2) yes. The district court disagreed with the jury's finding that Pizzitolo was a seaman and granted Electro-Coal's motion for JNOV on the issue of seaman status; Pizzitolo appeals that ruling. Electro-Coal is displeased with the district court's refusal to grant its motions for directed verdict and judgment NOV on grounds the evidence was insufficient to support the jury's finding that it was negligent.

II.

The question we must decide is whether the jury was entitled to find that Pizzitolo, a harbor worker whose contact with vessels is limited to

performing vessel repairs, was a seaman within the meaning of the Jones Act.

The parties frame the dispute as one of whether Pizzitolo qualifies as a seaman or member of the crew of a vessel under a prong of the familiar Offshore Co. v Robison, 266 F.2d 769, 779 (5th Cir. 1959) test: whether Pizzitolo performed a substantial portion of his work aboard a fleet of vessels. Because coverage under the Jones Act and the LHWCA is mutually exclusive, this argument assumes that Pizzitolo is not covered by the LHWCA. For reasons that follow, we conclude that this premise cannot stand; Pizzitolo is covered by the LHWCA and is not a member of the crew of a vessel. We will first consider the reasons Congress adopted the LHWCA in 1927 and who were the intended

beneficiaries of the Act. We will then examine the 1972 amendments to the Act and their effect on coverage of ship repairers like Pizzitolo under the Act.

A. HISTORICAL BACKGROUND

Before Congress passed the Jones Act in 1920, seamen had no right to sue the vessel owner for negligence. Chelentis v. Luckenback S.S. Co., 247 U.S. 372, 38 S.Ct. 501, 62 L.Ed. 1171 (1918). The Jones Act, overruled Chelentis and granted "any seaman" an action for damages for the negligence of the vessel owner, the master or fellow crewmembers. Act of June 5, 1920, Ch. 250 Section 33, 41 Stat. 1007 (codified at 46 U.S.C. Section 688).

A compensation scheme for harbor workers developed much slower. In 1917, the Supreme Court in Southern Pacific Co.

v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917) held that a state could not constitutionally make its workmen's compensation laws applicable to harbor workers injured on a vessel. The Court reasoned that the application of different state statutes would result in the "destruction of the very uniformity in respect to maritime matters which the constitution was designed to establish." Id. at 217, 37 S.Ct. at 529.

Congress recognized the gap: State compensation acts covered workmen injured on the dock yet land-based harbor workers injured aboard vessels had no compensation remedy. Between 1917 and 1927, Congress struggled to provide benefits to harbor workers. Its first attempt came five months after Jensen was decided. Congress sought to make state

compensation remedies available to harbor workers by amending the Saving to Suitors Clause to preserve "to claimants the rights and remedies under the workmen's compensation law of any state." Act of Oct. 6, 1917, Ch. 97, 40 Stat. 395. But the Court in Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S. Ct. 438, 64 L.Ed. 834 (1920) struck down this effort on grounds that Congress could not delegate such legislation to others.

Congress apparently thought that state compensation benefits could be constitutionally extended to harbor workers if they made it clear that such benefits were not available to seamen.¹

¹ See Gilmore & Black, The Law of Admiralty 407 (2d ed. 1975); Engerand & Bale, Seaman Status Reconsidered, 24 S.Tex. L.J. 431, 442 n. 89 (1983).

Both houses of Congress distinguished
(continued...)

In 1922, after enacting the Jones Act remedy for seamen, Congress tried once again to make state compensation statutes available to land-based harbor workers. This time, Congress amended the Savings to Suitors Clause to preserve "to claimants for compensation for injuries to or death of persons other than to master or members of a crew of a vessel, their rights and remedies under the workmen's compensation law of any state,

¹(...continued)

between port workers and seamen. The Senate report provided that: "Longshoremen and ship repairmen are land workers subject neither to the peculiar conditions nor to the laws which regulate seamen. They form a part of the labor force of each state exactly as other workmen in the port in which they are employed. They are not migratory but local; their wages, their conditions of living are governed by local standards." S. Rep. No. 94, 67th Cong., 1st Sess. 1, 2-3 (1921). The House Report provided that the harbor workers "are part of the local labor force and are permanently subject to the same conditions as are other local workmen." H.R. Rep. No. 639, 67th Cong., 2d Sess. 1, 2 (1922).

district, territory or possession of the United States, which rights and remedies when conferred by law shall be exclusive...." Act of June 10, 1922, Ch. 216, 42 Stat. 634. The exclusion of vessel crewmembers from coverage under this legislation did not save it; in Washington v. W. C. Dawson & Co., 264 U.S. 219, 44 S.Ct. 302, 68 L.Ed. 646 (1924), the Court held the legislation unconstitutional.

Another significant opinion from the Supreme Court was handed down shortly before Congress passed the LHWCA. In International Stevedoring Co. v. Haverty, 272 U.S. 50, 47 S.Ct. 19, 71 L.Ed. 157 (1926), a longshoreman was injured by the negligence of a fellow employee and the injured longshoreman sued his employer under the Jones Act. The Court allowed

Haverty to recover under the Jones Act by giving an expansive interpretation to the word seaman "to include stevedores employed in maritime work on navigable waters." Id. at 52, 47 S.Ct. at 19.

In 1927, within months of the Haverty decision, Congress passed a uniform federal compensation act for maritime workers, the LHWCA.² This Act required the employer to provide prescribed benefits "in respect of disability or death of an employee, but only if a disability or death results from an injury occurring upon the navigable waters of the United States ... and if recovery for the disability or death through workmen's compensation

² Act of March 4, 1927, Ch. 509, 44 Stat. 1424 (codified as amended at 33 U.S.C. Section 901-950).

proceedings may not validly be provided by state law." The intended beneficiaries of the Act are spelled out in the Senate report:

The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as "longshoremen." These men are mainly employed in loading, unloading, refitting and repairing ships: but it should be remarked that injuries occurring in loading or unloading are not covered unless they are on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States.

S.R. No. 973, 69th Cong., 1st Sess. 16 (1927). The 1927 Act, consistent with the 1922 Act, did not extend benefits to "a master or member of a crew of any vessel...." Act of March 4, 1927, Ch. 509, Section 2(3), 44 Stat. at 1425.

No definition of "member of a crew" is included in the LHWCA, but two Supreme

Court cases are instructive on its meaning. In South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 60 S.Ct. 544, 84 L.Ed. 732 (1940), a workman drowned while working aboard a lighter used for providing coal to steamships. The Court was presented with the question of whether his widow was entitled to benefits under the LHWCA.

The Court described generally the type of workers who were covered by the Act despite the "member of the crew" exception:

We think it is clear that Congress in finally adopting the phrase 'a master or member of a crew' in making its exception, intended to leave entitled to compensation all those various sorts of longshoremen and harbor workers who were performing labor on a vessel....

* * * * *

They were persons serving on

vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation.

Id. at 257, 260, 60 S.Ct. at 548, 549.

The most definitive expression by the Court on the meaning of the member of the crew exclusion and the relationship between that exclusion and "seamen" in the Jones Act was made in Swanson v. Marra Brothers, Inc., 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045 (1946). The question before the Court was whether a longshoreman injured on a dock could recover benefits under the Jones Act. The employee argued that Haverty established his right to claim Jones Act benefits and that his right to such benefits was unaffected by the LHWCA

because he was injured on land, outside the coverage of the LHWCA. The Court first discussed the relationship between the member of the crew exclusion of the LHWCA and seamen who are covered by the Jones Act: "We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the Haverty case only such rights to compensation as are given by the Longshoremen's Act." Id. at 7, 66 S.Ct. at 872. The Court made it clear that the LHWCA legislatively overruled Haverty: "The Act thus excludes from its benefits stevedores not members of the crew who are injured on navigable waters from

recovering under the Jones Act as interpreted by the Haverty Case." Id. at 6, 66 S.Ct. at 871. The Court affirmed the dismissal of the Jones Act suit and concluded that Swanson was relegated to his remedy for compensation under state law.

The Supreme Court decided several cases in the 1940's and 1950's on the question of whether facts in a particular case were sufficient to permit a finding that the employee was a seaman and eligible to claim Jones Act damages.³

³ Butler v. Whiteman, 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed.2d 754 (1958) (laborer). Grimes v. Raymond Concrete Pile Co., 356 U.S. 252, 78 S.Ct. 687, 2 L.Ed.2d 737 (1958) (construction worker engaged in constructing, transporting and installing a radar warning station 110 miles offshore); Senko v. LaCrosse Dredging Corp., 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404 (1957) (crewmember aboard a dredge); Gianfala v. Texas Co., 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed.775 (1955) (an oilfield worker employed aboard a submersible drilling
(continued...))

None of the workmen whose status was under consideration in those cases was a longshoreman, ship repairer or other traditional harbor worker; consequently those cases do not assist us in our analysis of today's case.

In summary, the efforts of Congress to cover harbor workers before 1927, the language of the 1927 LHWCA, the legislative history of the Act and decisions of the Supreme Court after its enactment reflect what Congress intended to benefit when it adopted the LHWCA: The land-based harbor workers such as longshoremen and ship repairers who were

³(...continued)
barge); Desper v. Starved Rock Ferry Co., 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed. 205 (1952) (crewmember status denied on ground that the vessel was not engaged in navigation); Norton v. Warner Co., 321 U.S. 565, 64 S.Ct. 747, 88 L.Ed. 931 (1944) (a boatman on a barge).

injured on vessels and ineligible to recover state workers' compensation benefits. Congress distinguished seamen or vessel crewmembers from the land-based harbor workers and provided a distinct remedy for them in the Jones Act.

B. THE 1972 AMENDMENTS TO LHWCA

In 1972, Congress made its first significant amendment to the 1927 Act.

In Director, OWCP v. Perini North River Assoc., 459 U.S. 297, 313, 103 S.Ct. 634, 645, 74 L.Ed.2d 465 (1983), the Court explained that the amendments were primarily intended "to raise the amount of compensation available under the LHWCA, to extend coverage of the Act to include certain contiguous land areas, to eliminate the longshoremen's strict-liability seaworthiness remedy against shipowners, to eliminate shipowner's

claims for indemnification from stevedores, and to promulgate certain administrative reforms."

The amendment to the definition of employee is the change most relevant to the issue in this case. The definition of "employee" was amended to include "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include ... a master or member of a crew of any vessel; ..." 33 U.S.C. Section 902(3). Given the judicial gloss placed on the 1927 Act, the amendment did not materially change the type of workers entitled to coverage. In Director, OWCP v. Perini, 459 U.S. at 315, 103 S.Ct. at 646, the

Court held that coverage of employees injured on navigable waters was not reduced or restricted by the 1972 amendments. Significantly the amended Act did, however, expressly provide coverage for employees engaged in certain occupations including longshoremen, shipbuilders, ship repairers and ship-breakers. Coverage was also extended to cover injuries occurring not only on navigable waters but also on "any adjoining pier, wharf, dry dock, terminal, building, way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. Section 903(a).

Congress could have hardly made it clearer that it intended to afford complete coverage to employees engaged in

the occupations enumerated in the Act so long as the location of the injury met the situs test. So that harbor workers who worked on both vessels and the adjacent dock would not walk in and out of coverage during the course of their work, the benefits of the Act were extended to them while working on land adjacent to the water. See Northeast Marine Terminal v Caputo, 432 U.S. 249, 261, 97 S.Ct. 2348, 2356, 53 L.Ed.2d 320 (1977).

[1] Although the Supreme Court has had occasion to consider the definition of "employee" under the amended Act in several cases,⁴ it has not addressed

⁴ Herb's Welding, Inc. v. Gray, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985); Director, OWCP v. Perini North River Assoc., 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983); Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 100 (continued...)

whether an employee engaged in one of the occupations expressly covered by the LHWCA is eligible for Jones Act benefits. Our own cases, however, provide support for the view that a workman engaged in one of these occupations is unqualifiedly covered by the LHWCA and therefore ineligible for benefits under the Jones Act. In Bouvier v. Krenz, 702 F.2d 89 (5th Cir. 1983), the decedent was employed by Avondale Shipyards as a rigger. Mr. Bouvier's duties consisted primarily of removing machinery from vessels to be taken ashore for repair and then reinstalling the repaired machinery.

⁴(...continued)

S.Ct. 2432, 65 L.Ed.2d 458 (1980); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed. 2d 320 (1977).

We held that Bouvier's relationship to the vessels on which he worked was not sufficiently continuous or substantial to permit a jury to find seaman status. Alternatively, we stated that even if the relationship to the group of vessels had been substantial, "nevertheless Bouvier's work as a shore-bound ship repairman working for a shipyard does not make him a Jones Act seaman.... We observe also that the Longshoremen's and Harbor Workers' Compensation Act specifically covers 'any harborworker, including a ship repairman [or] shipbuilder ... [but not] a master or member of a crew of any vessel.... The language of the LHWCA thus strongly supports, indeed arguably demands, the conclusion that a harbor-bound ship repairman is as a matter of law not a 'member of a crew' and thus not

a Jones Act seaman." Id. at 91.

In Balfer v. Mayronne Mud & Chemical Co., 762 F.2d 432 (5th Cir. 1985), Balfer was employed to load sacks of chemicals aboard barges and other vessels at his employer's dock. We affirmed the district court's summary judgment in favor of the employer and held that Balfer's exclusive remedy was under the LHWCA. We stated: "Viewing the record in the light most favorable to Balfer, it is manifestly clear that Balfer was a longshoreman and not a seaman." See also Buras v. Commercial Testing & Engineering Co., 736 F.2d 307 (5th Cir. 1984); Thomas v. Peterson Marine Service, Inc., 411 F.2d 592 (5th Cir. 1969). Although we have on occasion analyzed the question of whether an employee engaged in longshoring or ship repairing was a

member of the crew of a vessel under the Robison test⁵ we are persuaded that such an analysis is unnecessary if the employee is engaged in an occupation expressly enumerated in the Act.

C. CONCLUSION

[2] The 1927 LHWCA, in effect, amended the Jones Act to make Jones Act benefits available only to maritime workers not covered by the LHWCA. Harbor workers engaged in occupations such as longshoring, shipbuilding and ship repairing, who were injured on navigable water, were the intended beneficiaries of the 1927 Act. The LHWCA as amended in 1972 expressly covered workmen engaged in

⁵ See., e.g., Jones v. Mississippi River Grain Elevator Co., 703 F.2d 108 (5th Cir. 1983); Stokes v. B.T. Oilfield Services, Inc., 617 F.2d 1205 (5th Cir. 1980); Burns v. Anchor-Wate Co., 469 F.2d 730 (5th Cir. 1972).

these occupations. In 1972, coverage of these workmen's activities was extended beyond navigable water to cover their injuries on adjacent landbased work locations. Given the explicit coverage of workmen engaged in the enumerated occupations, we reject the notion that Congress could have intended to exclude them from the benefits of the LHWCA as members of the crew of a vessel. In sum, we hold that because longshoremen, shipbuilders and ship repairers are engaged in occupations enumerated in the LHWCA, they are unqualifiedly covered by that Act if they meet the Act's situs requirements; coverage of these workmen by the LHWCA renders them ineligible for consideration as seamen or members of the crew of a vessel entitled to claim the benefits of the Jones Act.

The only work Pizzitolo performed aboard vessels was electrical repair work. Even if he spent a substantial portion of his work time aboard a recognized fleet of vessels performing electrical repairs, for reasons stated above he is covered by the LHWCA and cannot qualify as a seaman within the meaning of the Jones Act.

AFFIRMED.

APPENDIX "B"

JUDGMENT AND ORDER CITING REASONS
FOR JUDGMENT NOTWITHSTANDING THE VERDICT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

HONORABLE A. J. McNAMARA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NICHOLAS R. PIZZITOLLO	*	CIVIL ACTION
VERSUS	*	NO. 83-5243
ELECTRO-COAL TRANSFER CORPORATION	*	SECTION "D" (5)

J U D G M E N T

For the reasons set forth in the court's Order dated December 11, 1985 granting a judgment in favor of the defendant notwithstanding the jury's verdict;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Defendant, Electro-Coal Transfer Corporation, and against Plaintiff, Nicholas R. Pizzitolo, DISMISSING Plaintiff's complaint at his costs.

New Orleans, Louisiana, this 11th
day of December, 1985.

s/ A. J. McNamara

UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NICHOLAS R. PIZZITOLO	*	CIVIL ACTION
VERSUS	*	NO. 83-5243
ELECTRO-COAL TRANSFER CORPORATION	*	SECTION "D" (5)

O R D E R

A trial in this matter, held October 22, 1985, resulted in a jury verdict in favor of Plaintiff, Nicholas R. Pizzitolo, on the issues of seaman status and liability. Subsequent to this verdict, Defendant, Electro-Coal Transfer Corp. (Electro-Coal), moved for a judgment notwithstanding the verdict on the grounds that there was no reasonable evidentiary basis for the jury's findings on either of these issues. The parties later filed memoranda concerning whether

or not the court should grant a judgment notwithstanding the verdict in this case, and the matter was taken under advisement. Having considered the evidence, the memoranda filed by counsel, and the applicable law, I find that a judgment notwithstanding the verdict should be entered in favor of Electro-Coal on the issue of seaman status.

In reaching this decision, I recognize that the standard to be applied in determining whether or not a court should grant a judgment notwithstanding the verdict on the issue of seaman status, is the standard of whether there was a reasonable evidentiary basis for the jury's finding. Wallace v. Oceaneering International, 727 F.2d 427 (5th Cir. 1984).

Upon reviewing the evidence, I find

that while the relationship of the vessels in question to the operation of Electro-Coal's business is substantial, that relationship is not the proper focus on the seaman status inquiry. In determining whether or not a plaintiff can be properly classified as a seaman, the focus of the inquiry is not the relationship of the vessels to the defendant's business, but the nature of the plaintiff's relationship to the vessels. Specifically, in order to be classified as a seaman, a plaintiff must show that he was permanently assigned to a vessel or fleet of vessels or performed a substantial part of his work aboard the vessel; and, that his employment contributed to the function of the vessel or to the accomplishment of its objective or to the maintenance of the vessel

during a voyage or during anchorage for trips in the future. Offshore Company v. Robison, 266 F.2d 769, 779 (5th Cir. 1959).

In this case, I find the evidence is overwhelming that the plaintiff's duties aboard the vessels were not substantial but merely transitory or sporadic and plaintiff's relationship to the vessels lacked the permanency required by Robison. On those occasions when the plaintiff was required to work on a vessel, he would be on the vessel only for the purpose of performing some specific electrical repair and once the repair was accomplished, the plaintiff would leave the vessel and return to the electrical shop for his next assignment which, more often than not, would be shoreside in the plant and completely

unrelated to any vessel activity. Accordingly, plaintiff has failed to satisfy the first prong of the Robison test and, therefore, may not be classified as a seaman. In summary, when considered in the light most favorable to the plaintiff, I find the facts and inferences as to the seaman status question point so strongly and overwhelmingly in favor of the defendant that reasonable men could not arrive at a contrary verdict. See, Boeing Company v. Shipman, 411 F.2d 365 (5th Cir. -1969).

Because I have determined that the plaintiff does not have seaman status, there is no need to address the issue of negligence.

Judgment will be entered accordingly.

New Orleans, Louisiana, this 11th
day of December, 1985.

s/ A. J. McNamara

UNITED STATES DISTRICT
JUDGE

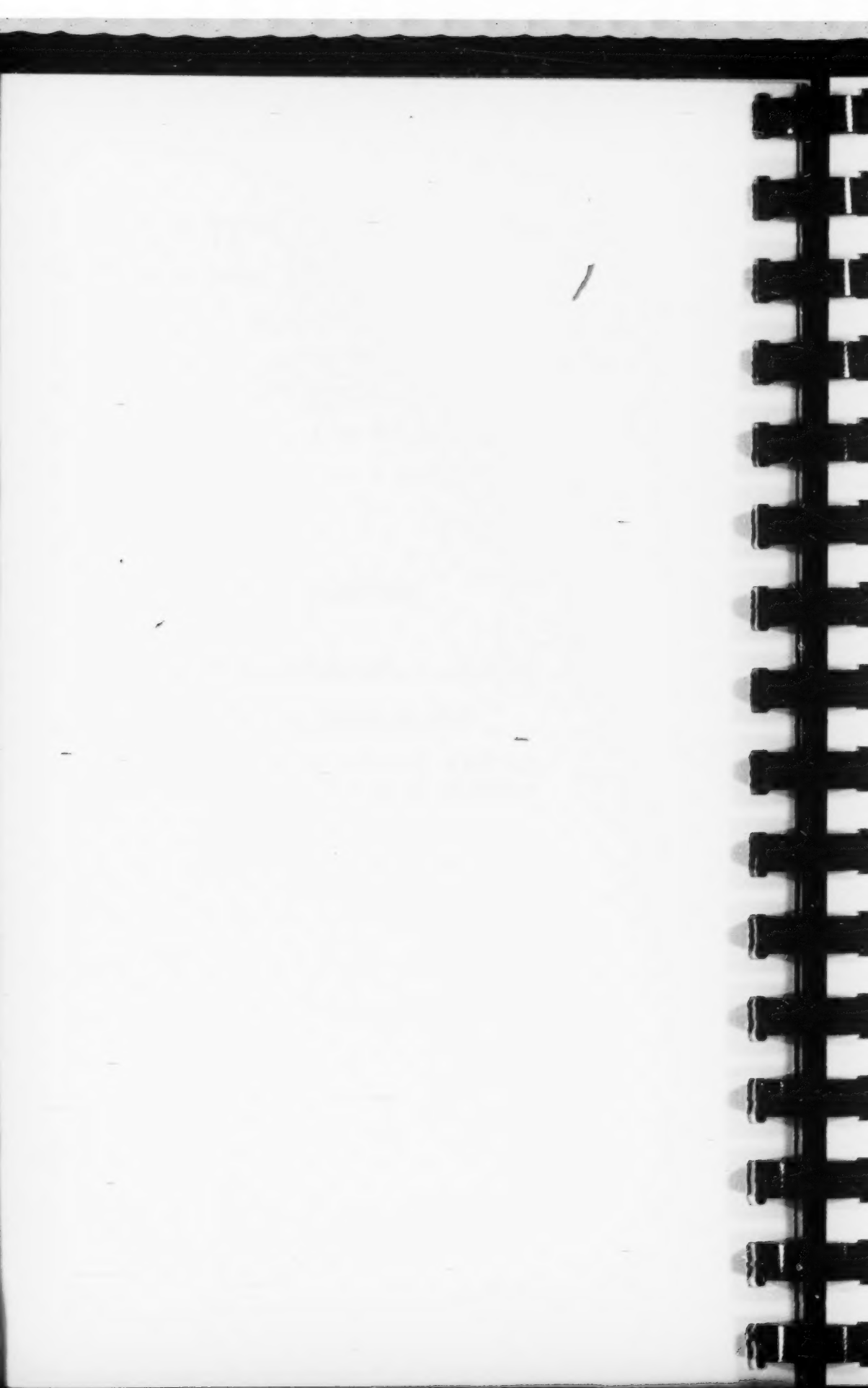
APPENDIX "C"

DENIAL - DEFENDANT'S MOTION

FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY
SEPTEMBER 26, 1984



MINUTE ENTRY
McNAMARA, J.
September 26, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NICHOLAS R. PIZZITOLO	*	CIVIL ACTION
VERSUS	*	NO. 83-5243
ELECTRO-COAL TRANSFER CORPORATION	*	SECTION "D" (5)

Before this court is the Motion of Defendant, Electro-Coal Transfer Corporation, for Summary Judgment in the above captioned matter seeking dismissal of the claims of Plaintiff, Nicholas Pizzitolo. A memorandum in opposition to the Motion for Summary Judgment has been filed.

Having considered the memoranda of counsel and the applicable law, the court finds as to Defendant, Electro-Coal

Transfer Corporation, there is a genuine issue as to a material fact and Defendant, Electro-Coal Transfer Corporation, is not entitled to Summary Judgment in its favor as a matter of law; accordingly,

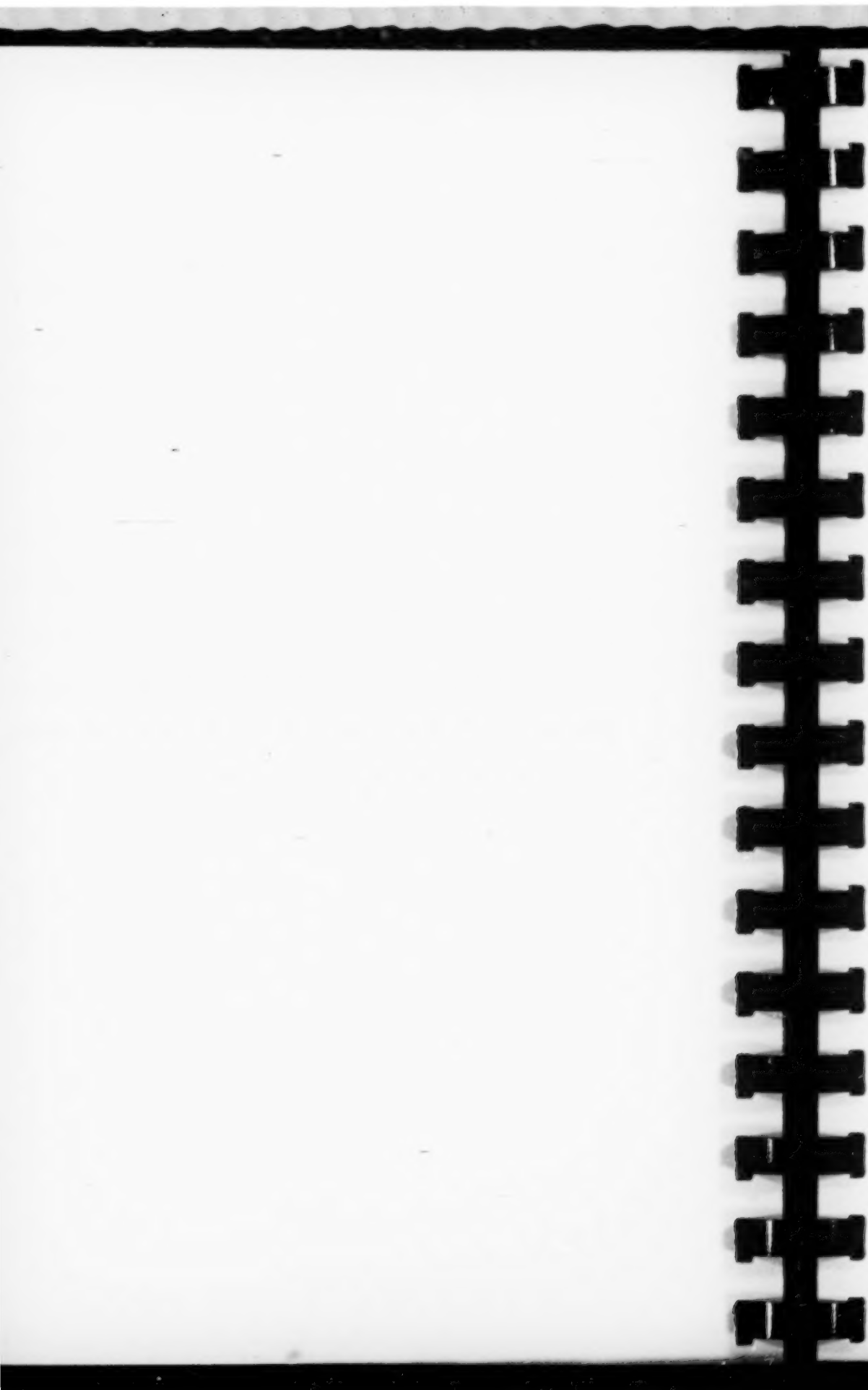
IT IS ORDERED that the Defendant's Motion for Summary Judgment seeking dismissal of the complaints against Electro-Coal Transfer Corporation be and it is hereby DENIED.

APPENDIX "D"

DENIAL - PETITION FOR REHEARING

DENIAL - SUGGESTION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT



IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 86-3006

NICHOLAS R. PIZZITOLO,
Plaintiff-Appellant,

and

NATIONAL UNION FIRE INSURANCE COMPANY,
Intervenor-Appellant,

versus

ELECTRO-COAL TRANSFER CORPORATION,
Defendant-Appellee.

Appeal from the United States District
Court for the Eastern District of
Louisiana

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion 3-20-87, 5 Cir., 198 ,
 F.2d)

(JULY 7, 1987)

Before GARZA, DAVIS and JONES, Circuit
Judges.

PER CURIAM:

(x) The Petition for Rehearing is
DENIED and no member of this panel nor
Judge in regular active service on the
Court having requested that the Court be
polled on rehearing en banc, (Federal
Rules of Appellate Procedure and Local
Rule 35) the Suggestion for Rehearing En
Banc is DENIED.

ENTERED FOR THE COURT:

s/ W. Eugene Davis

United States Circuit Judge

REHG-6

APPENDIX "E"

TRIAL COURT'S RULING ON DEFENDANT'S
MOTION TO AMEND ORDER GRANTING JUDGMENT

NOTWITHSTANDING THE VERDICT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY
JANUARY 15, 1986



MINUTE ENTRY

McNAMARA, J.

January 15, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NICHOLAS R. PIZZITOLO	*	CIVIL ACTION
VERSUS	*	NO. 83-5243
ELECTRO-COAL TRANSFER CORPORATION	*	SECTION "D" (5)

Before the court is the Motion of Defendant, Electro-Coal Transfer Corporation, to Amend the court's Order and Reasons for Judgment which were entered on December 13, 1985. The Motion, scheduled to be heard on Wednesday, January 15, 1986, was submitted to the court on briefs, without oral argument.

Having considered the memoranda of

counsel and the applicable law;

IT IS ORDERED that Defendant's
Motion to Amend the court's Order and
Reasons for Judgment is hereby DENIED.

s/ AJM

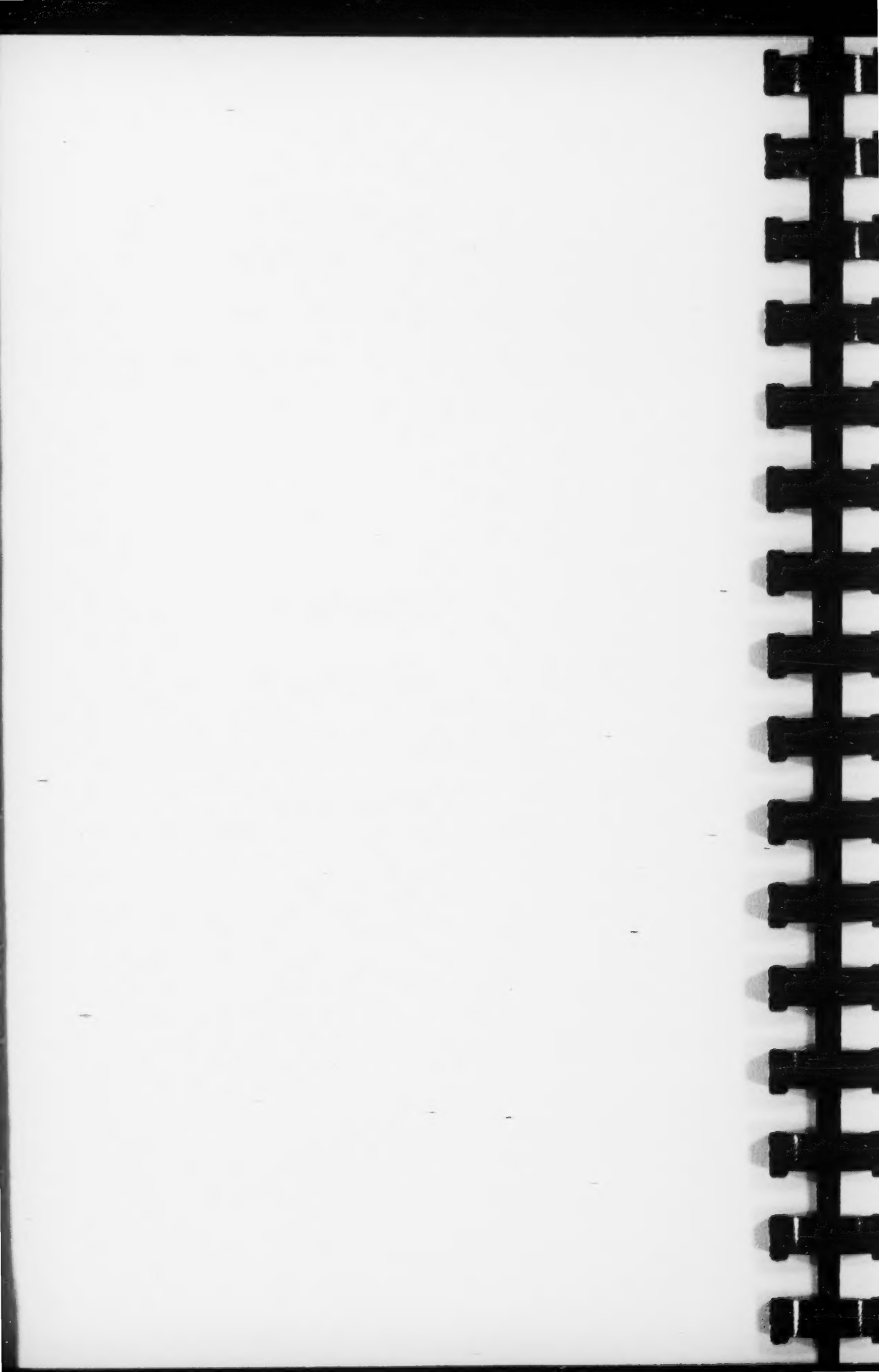
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APPENDIX "F"

JURY VERDICT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY
INTERROGATORIES TO THE JURY



83-5243

(5)

PLAINTIFFS

NICHOLAS R. PIZZITOLO

DEFENDANTS

ELECTRO-COAL
T R A N S F E R
C O R P O R A T I O N

INTERVENTION (8-2-84)

NATIONAL UNION FIRE INSURANCE
COMPANY

46 USC 688 - JONES ACT - MARINE, PERSONAL
INJURY

ATTORNEYS

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887-6571

and

Victor Marsiglia, Jr.
same address

FOR: Pltf

John O. Charrier, Jr., Esq.
Edward R. Getz, Esq.
Jeanmarie Lococo
JONES, WALKER, ETC.
225 Baronne St., 18th Floor
New Orleans, LA 70112
581-6641

FOR: Electro-Coal Transfer Corp.

MCGLINCHEY, STAFFORD, MINTZ, CELLINI
& LANG

Lance S. Ostendorf, Esq.
630 Camp St.
NOLA 70130
586-1200

FOR: INTERVENOR

WEDNESDAY, OCTOBER 23, 1985

10:30 AM

JURY TRIAL (held and cont'd from
10/22/85)

CTRM. DEPUTY: Pam Radosta
CT. REPORTER: Tom Conrad

All present and ready.

Jury returned to courtroom.

Deft. Rests.

Pltf's Rebuttal Witness: Nicholas
Pizzitolo, recalled, resumes testimony.

Pltf. Rests.

Jury removed from courtroom.

Deft. re-urges Motion for Directed
Verdict - ORDERED SUBMITTED.

Jury returned to courtroom.

Closing arguments made by counsel for
plaintiff and defendant.

Jury Charged and Instructed by the Court.

Jury retires for deliberation at 1:45 PM.

Jury returns from deliberation at 3:00 PM.

VERDICT: See Verdict Form Attached.

On Motion of Defendant, jury polled and all answered in the affirmative.

Jury excused.

Deft. orally moves for Judgment Notwithstanding the Verdict - ORDERED SUBMITTED.

Additional briefs to be filed by 5:00 PM on Friday, November 22, 1985.

Court Adjourned.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NICHOLAS PIZZITOLO

CIVIL ACTION

VERSUS

NO. 83-5243

ELECTRO-COAL TRANSFER
CORP.

SECTION "D"(5)

INTERROGATORIES TO THE JURY

1. On March 25, 1982, the date of Mr. Pizzitolo's accident, was he employed by Defendant, Electro-Coal Transfer Corporation, as a seaman or a member of the crew of a vessel or identifiable fleet of vessels or was he employed by Electro-Coal Transfer Corporation in some other capacity but not as a seaman?

A. He was employed as a seaman or member of the crew of a vessel or identifiable fleet of vessels "X"

B. He was employed in some

other capacity but not as a
seaman _____

(NOTE:

In answer to Question One above, if you checked paragraph "A", answer the remaining questions that follow. If, however, in answer to Question One you checked paragraph "B", you should answer no further questions but have your Foreperson date and sign this Form and return to the Courtroom.)

2) Do you find that the negligence of the Defendant was a legal cause of the accident on March 25, 1982?

YES X

NO

3) Do you find that the negligence of the Plaintiff was a legal cause of his own accident?

YES

NO X

(NOTE:

If your answer to Question Three is "Yes", answer Question Four. If your answer to Question Three is "NO", do not

answer Question Four but have the Foreperson date and sign this Form and return to the Courtroom.)

4. If your answer to Question Three was "YES", please indicate below the relative percentages of negligence that caused the Plaintiff's accident.

A. Negligence of the Defendant . . .

B. Negligence of the Plaintiff . . .

TOTAL . . .

(NOTE:

The total of the two percentages given in answer to Question Four should be 100 percent.)

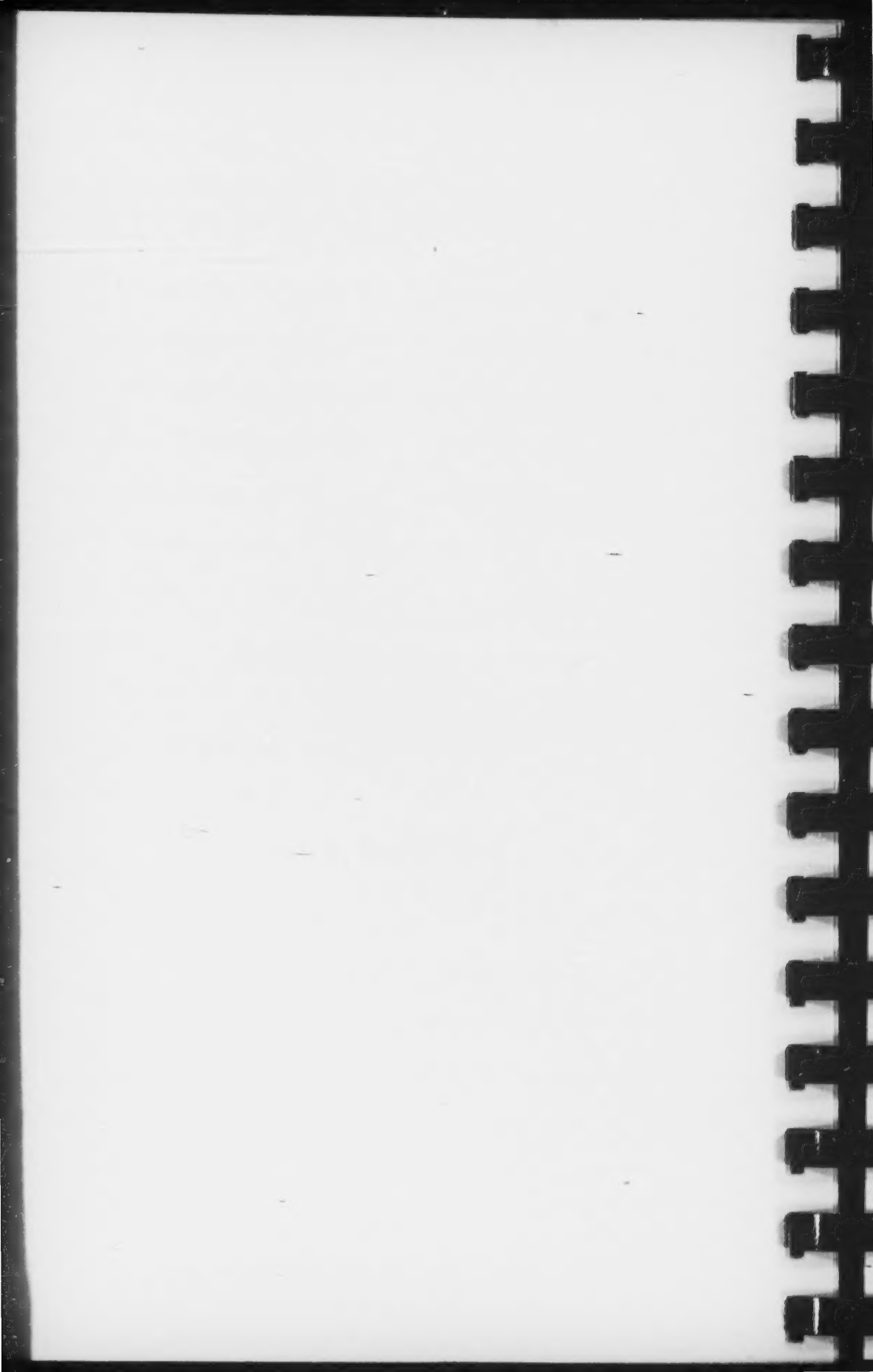
DATE: 10-23-85

s/ Donald C. Saulruey

F O R E P E R S O N

APPENDIX " G "

TRIAL TRANSCRIPT EXCERPTS



APPENDIX " G " - INDEX

TRIAL TRANSCRIPT EXCERPTS

Testimony of
NICHOLAS R. PIZZITOLO
(Volume 4)

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JOE DAVID RICE
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[4]

[4]

BY MR. KLEPPNER:

Q Mr. Pizzitolo, would you describe for the jury, as you recollect, or recall, what the operations of the Electro-Coal plant, where you worked, were, what do they do?

A We maintain all electrical equipment and boats.

Q Now, would you tell the jury, please, what electrical equipment, first, you referred to when you said you maintained the electrical equipment and boats, what electrical equipment did you maintain?

A We maintained on the boats, we maintained all the electrical equipment which consists of -- on the harbor boats you got winches, lighting, generators, you have sensing units.

Q First of all, tell the jury what boats you are referring to, you said harbor boats.

A I'm referring to the harbor boats, that's the AUDRY PEARSON, BLAIR WILSON, the ELECTRA, and the GINNY HOWELL.

[6]

[6]

BY MR. KLEPPNER:

Q Is any of the coal that's brought into Davant brought by any other means than water?

A No, sir, without water they couldn't function.

Q Is any of the coal that's brought into Davant brought by any other means than vessels?

A No, sir.

Q Is any of the coal that's brought to Davant transported from Davant by any other means than water?

A No, sir, it's got to be water.

Q Where were the four boats which you just described as harbor tugs maintained, where were they kept?

A They are kept at Davant and they were maintained by the electrical crew on

the electrical problems.

Q How many personnel were involved with the operations of these harbor boats?

A Each boat had, I think it was referred to as the captain of the boat and deckhand.

Q Were there any electricians aboard these boats?

A No, sir.

Q Were there any electrical systems aboard these boats?

A Yes, sir, these boats were total electrical dependent.

Q Would you be more specific and tell the jury what specific systems on these harbor boats were dependent upon electrical operations.

A Their radar was dependent, their winches, so that way they could get

hooked onto the barges. We have electrical devices to measure their fuel to let them know when the fuel -- they were low on fuel. They had switches to tell the oil pressure to make sure that the engine wouldn't run out of oil. We had pressure switches, oil pressure switches, water temperatures switches, that was to protect the engine. Then, on the generators we had large panels with rheostats where you can regulate the voltage where you wouldn't raise the voltage up too high. It had to maintain a certain voltage. We had frequency meters where you would put it into the right cycle and we operate on sixty cycles. We had electrical motors that ran pumps, developed the air pressure to help start the engines, and also to help them with their steering which was

hydraulic. So, if you lost electrical power, you wouldn't have the hydraulics. We maintained the air conditioning units, cleaned them, fixed them, changed motors. We maintain all the lighting, switches, receptacles. One boat in particular had a boom on the back, a hydraulic boom, we supplied the power for the switches to release the hydraulics.

Q Now, what function did those boats play in the movement of coal?

A Those boats were vital, these boats were vital, they was the only ones that could bring the coal to the dock. The white boats were too big to come inside. They would bring the coal to the dock to unload and the white boats would be anchored out into the river and the little boats would have to go out, the harbor tugs would have to go out, pick

the barges, bring it in, take the empty barge out and bring it back out into the river and tie them up.

Q What was your specific job title at Electro-Coal?

A Senior electrician.

Q How many members were there in the electrical crew at Electro-Coal when you worked there?

A They had three shift electricians, let's see, in the day we had Dale, Jack White, Robert, Alvin Trupiano, myself and Freddie, approximately six men.

Q How many senior electricians were there?

A I was the only senior electrician.

Q What is shift work?

A Shift work, we have men, the plant operates twenty-four hours a day and we have men that work twelve-hour shifts,

they are separate from us. They belong to our department, but they don't do any of the repair work.

Q What were you?

A I was senior electrician, required to do repair work on the boats and on land.

Q Did you work days, or nights?

A I worked days.

Q Now, who maintained and repaired the electrical systems on these four harbor boats?

A The electrical department.

Q Whom did that consist of?

A That consist of our crew.

Q Was anyone else, to your knowledge, connected with Electro-Coal, or its sister companies, charged with the repair and maintenance of those harbor boats?

A No, sir, that was our

responsibility. Only when something big would break, then they would have to take it to drydock.

Q When the repairs that you talked about and maintenance that you mentioned were performed, where were these vessels?

A These vessels were in the river.

Q And what was their condition, were they moving or still?

A Sometimes moving, sometimes still. We would work on them, if we couldn't shut them down, we would have to work on them while they were still moving.

Q In comparison with your fellow members of your crew, did you work more than others, or less than others aboard those boats?

MR. CHARRIER: Your Honor, I object to the form of the question, one, its leading.

Number two, it isn't specific, particularly in the case of this kind--

THE COURT: Objection overruled.

MR. CHARRIER: Thank you, sir.

THE WITNESS: Sir, could you repeat it?

THE COURT: In comparison to the other members or other electricians, did you work more than, or less than them on vessels?

THE WITNESS: I would say more than them, because I was the senior.

BY MR. KLEPPNER:

Q Were you required to wear any special clothing at all when you went aboard these vessels?

A Yes, sir, hard hat and life jacket.

Q Would you describe for the jury the distance that these harbor tugs traveled in the course of their operations,

generally. -

A I would estimate it could be about - they could be roughly maybe a mile downriver, and then they would have to go down pick it up and come back and bring the barge. Now, they would be times when they turning ships and they would be out in the middle of the river helping these big ships to turn around to head out to the mouth of the river.

Q Were there any other vessels that remained in the vicinity of Davant that had electrical systems for your maintenance?

A Yes, sir, the white, the river tugs and the oceangoing tugs --

Q Well, let's start --

A -- would be in our vicinity, we had to do -- the electric department would do maintenance on them.

Q What were the river tugs?

A The river tugs what we refer to them is the big white boats, all these, because they so big. There was the JULIA WOODS, GIRLIE KNIGHT, MARTHA LYNN.

Q Now, where did these river rugs travel to and from, if at all?

A These river tugs would go upstream to wherever they were picking up the coal and bring it back to us. That was their travel, up and down.

Q To your knowledge, did they have any other function, or duties, other than picking up coal for Electro-Coal's operations?

A To my knowledge --

MR. CHARRIER: Your Honor, I object, unless some additional predicate is laid.

THE COURT: Objection overruled.

THE WITNESS: Their sole -- sir, can

I answer that?

THE COURT: Yes.

THE WITNESS: Their sole object, to my knowledge, was to go up, pick up the coal and bring the coal back to us.

BY MR. KLEPPNER: -

Q When they were in the Davant area, how long would they generally stay?

A That would depend on the amount of barges that they brought in. The barges would vary, the number of barges they would bring in, but roughly I would say four days.

Q How were these vessels powered?

A These vessels were powered by diesel engines and electrical power.

Q What sort of electrical systems were aboard these vessels, to your knowledge?

A These vessels had a lot of able-bodied seamens on it, they would have

stoves, refrigerators, air conditioners, generators, transformers, power panels, radar.

Q When these vessels were in the vicinity of Davant, did any of them ever experience electrical problems?

A Yes, sir.

Q When this occurred, who was charged with repairing them?

A The electrical crew, they would call us out and the electrical crew would go out and do it.

Q Can you recite to the jury any specific instances where you were required to repair electrical systems or replace them aboard these vessels?

A Yes, sir, at one time we had to install a ship-to-shore power and to do that we had to have a large transformer to receive the 440 and reduce it down,

the voltage, so when they were parked they wouldn't have to run their engines and drive their generators, they could operate off of shore power. And we also went out there and installed lighting for them, mounted large quartz lights. We worked on their stoves when they broken down, they couldn't travel upriver without their stoves, they needed their food.

Q How long did the work that you described in changing over the power systems take, do you recall?

A Three to four days.

Q For all four boats?

A No, sir, one boat.

Q How many boats were involved in this?

A Four boats, the four large white boats.

Q During the course of your work in this project, how were you dressed, any particular clothing you were required to wear?

A A life jacket, hard hat.

Q Where were the boats, were they out of the water, or in the water?

A They were in the river, upriver.

Q Did these vessels, that is, the river tugs, as we've called them, have any other electrical personnel, that is, electrician, aboard them?

A They had no electrician. They had an engineer, but he wasn't an electrician.

Q On the instances when you indicated you were assigned to work on these harbor tugs and also the river tugs, who assigned you that work?

A My foreman.

Q Who was that?

A We have two foremens, Manuel Guerra and Carl Rotolo.

Q Were there any other barges, or vessels in the immediate vicinity of Davant that employed electrical systems requiring your attention?

A There were the oceangoing tugs when they were in our vicinity and they had electrical problems we had to work on them.

Q Do you ever recall any instances of being required to work on these vessels?

A Yes, sir, I had lighting problems, we had motor problems with the winches.

Q What vessels were these, do you know their names?

A Yes, sir, there were six of them, BETTY CLUBRATH, BETTY WOOD, SARA HAYES, LIBBY BLACK, ELLINA HICKS, KATHERINE CLEWIS.

Q Did any of these vessels have on board an electrician, to your knowledge?

A No, sir.

Q Were there any barges that you were charged with repairing the electrical systems on?

A Yes, sir.

Q Would you tell the jury what those might have been?

A MARIE FLOOD, PEARLY JOHN, LOUISE KIRKPATRICK, THELMA COLLINS, BARBARA VOLT, PEARLY JOHN and CARGO ONE.

Q Let's start with CARGO ONE, where was it located?

A That was located downriver, approximately I estimate a mile downriver in the river.

Q What, if any, electrical systems required your attention on that barge?

A It was that barge was total

electric, the lighting, generator, lighting panels, even the microwave oven.

Q Did people live aboard this barge?

A No, sir, what it was, they will bring a crew out with -- the river tugs would bring the crew to the CARGO ONE, drop us off and then they would return back to the fleet.

Q When you worked aboard that barge, the CARGO ONE, were you required to wear any special safety devices?

A Yes, sir, life jacket and a hard hat.

Q Do you recall any specific work that you performed on that, besides the general items you just mentioned?

A Yes, sir, when the company leased the barge, there was no lighting on the barge and this being that we worked twenty-four hours a day, at night, with

the lighting situation was just so bad that we was told to go out there and get lights up so the men could work, so they could see, mount them on the side so they could see down onto the barges. Because this barge is like a ship and the small barges are low, and then they would have to go down into it with the bucket to take out the coal. And we had to put lighting. But, we had a tremendous problem with the lighting. At first, we just went out there and tried to put up temporary lighting and these cranes had like a drag line and to keep the buckets from swinging out too far, to try to control the bucket, what was happening the drag line was dragging over the barge and knocking down the lights and busting them up. First, we put up with EZ cord, then they would sit the bucket down on

the EZ cord, short the lights out and knock out the lighting. Then we tried-- my boss said we got to do something with the lighting, we went back out there and ran marine cable. The same problem happened. I told him, says, well, look, the only way we are going to be able to do this is to put it down in pipe, anchor the pipe to the deck and use the pipe to protect the wires. And then, we had to mount little short pieces of pipe about that tall and then mount the quartz lights on top. And then, we went all the way around the barge with that, put one back so when the crew would get up when they would change crews they would be able to see to come up the ladder, because there was no lighting. And we had to do checks every day, they had to have a man to go down there to check on

the generators to make sure that these generators were working for the next man, or for the next crew when they came on. The day crew would check it out to make sure it's working for the night crew.

Q Was anyone, other than your crew, charged with the repair and maintenance of the electrical system on CARGO ONE?

A No, sir, just our electrical crew.

Q Were your efforts aboard CARGO ONE occasional, or regular --

MR. CHARRIER: Your Honor, I object.

THE COURT: Objection sustained.

MR. KLEPPNER: Thank you, your Honor.

BY MR. KLEPPNER:

Q I am not sure whether this is repetitive: Was anyone else charged with the repair or maintenance of the electrical systems of the oceangoing tugs

which you described, when they were in the Davant area, other than your crew?

A No, sir, when they were in our area, we did all the electrical work on those boats.

[24]

[24]

BY MR. KLEPPNER:

Q Now, Mr. Pizzitolo, let's go back to the description of your vessel work, was there any difference in the duties and obligations you had with regard to the vessels that you described throughout the course of your employment with Electro-Coal, did it ever change?

A No, sir. We was always told that the vessels was top priority.

Q Do you ever recall any specific incidents that involved that particular priority?

A There was many times.

Q What occurred in those instances?

A We would have to, sometimes, two harbor boats would be down and it would be only two boats on the line and I would be working on the crane, they would say

let the crane go, come down, get the harbor boats back on the line.

Q Why?

A We need the boats, we got to have the boats, especially if the ladder machine is down, that takes two boats in itself, that would lock up two boats and if we got a ship at the dock, one boat would be breasting in on the ship and that would leave just one boat.

Q Why were the boats so vital to the operation of Electro-Coal, if you know?

MR. CHARRIER: Your Honor --

THE COURT: Objection sustained.

 You are leading the witness, you are testifying.

MR. KLEPPNER: All right.

THE COURT: Ask the question again.

BY MR. KLEPPNER:

Q Why were you told to do whatever you

did in the instance you just described, do you know?

A Yes, sir, because if we didn't have the boats in operation, we had our boats tied up, we couldn't move coal.

MR. KLEPPNER: Your Honor, may I have a moment before I conclude my questioning?

THE COURT: Yes.

MR. KLEPPNER: Very briefly, your Honor.

BY MR. KLEPPNER:

Q Mr. Pizzitolo, when you were working on vessels, where did you eat your meals?

A If we was working on the white boats, we would eat, they would let us eat on the boats, they would fix us a meal. If we was working on the oceangoing tugs, we would eat with the crew. If we worked on the river tugs,

sometimes if we was going to be out there all day, we would take our lunch. And if the job wasn't that big, we wouldn't take our lunch. But, I always took something, some form of food with me all the time.

[50]

[50]

BY MR. CHARRIER:

Q Mr. Pizzitolo, you said that the harbor boats were electrically dependent?

A Yes, sir.

Q These were the words you used?

A Yes, sir.

Q The harbor boats are powered by diesel engines, are they not?

A Yes, sir.

Q So, what turns the propellers on these harbor boats is a diesel engine, or two of them, perhaps?

A Yes, sir.

Q Do you know enough about diesel engines to tell us whether a diesel engine needs electricity to run?

A No, sir. But, I know they can't run at night without electricity.

Q They need electricity to run the

lights?

A The lights, their radar.

Q They need electricity to do the various other things you told us about?

A They need electricity to start up the engines to drive the pumps to build up the air pressure. Without no air pressure, they can't start the engines. They have to build up air pressure.

Q What moves those vessels along are diesel engines which burn fuel, is that right?

A Yes, sir.

Q And the same is true for those big white boats that you called them, that you also said were electrically dependent, those big white boats have two, or three engines of 2500-horse-power apiece, which are diesel powered, are they not?

A Yes, sir.

Q And those oceangoing tugs which go across the ocean, they are powered by some large diesel engines of three, four, or five thousand horse-power, are they not?

A Yes, sir. But, they still need electricity.

BY MR. CHARRIER:

Q Yes, sir. My question simply is, can you tell us in terms of percentages how much of your work was related to the vessel, repair work that you have described as opposed to the work of maintenance of the plant as we discussed?

A I would say eight to ten hours a week on the boats and the rest of it was plant work.

Q All right, so that in a forty-hour week, you are saying you would work eight to ten hours on the boats and its repair work?

A Yes, sir.

Q And was that true throughout your career at Electro-Coal?

A It was years, when it was more.

Q That would be a good average, is

that right, sir?

A Yes, sir, I would say so.

Q Mr. Pizzitolo, on the day of your accident, this vessel that you mentioned the name, CARGO ONE.

A Yes, sir.

Q Was not in service at Electro-Coal's plant anymore, was it?

A Sir, I can't remember that.

Q You don't have any information on that point, you don't have any recollection on that point, is that right?

A No, sir, I can't remember that.

Q Earlier, in the preparation of that case, you offered an affidavit that said that you spent twenty-five days in the year 1981, working on the CARGO ONE, do you recall giving such an affidavit?

MR. KLEPPNER: Your Honor, I object

to the question.

THE COURT: Objection overruled.

THE WITNESS: I've worked, I don't know about the year, but I've worked when we installed those lights, I worked twenty-five to thirty days.

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BY MR. CHARRIER:

Q So, this affidavit says that you worked twenty-five days in the year 1981 on the vessel, is that right, on the vessel CARGO ONE.

A That was installing the lights. But, I made other trips out there.

Q Well, that is not what this affidavit says, is it?

A No, sir, it doesn't say that.

Q The affidavit simply says that you performed electrical work on the vessel of the said corporation, that's Electro-Coal, named CARGO ONE, for at least twenty-five days, and was required to take your meals aboard the vessel?

A Yes, sir.

Q That's what it says?

A Yes, sir.

Q Now, today, you are telling me-- well, excuse me, today it's your testimony, well, I did more work than that --

THE COURT: That's not inconsistent with the affidavit, he said at least twenty-five days.

MR. CHARRIER: I am sorry.

THE COURT: You are suggesting that there is an inconsistency in the affidavit and his testimony. I am just commenting on the evidence --

MR. CHARRIER: I apologize.

THE COURT: -- that there is not.

BY MR. CHARRIER:

Q I am asking, is it your testimony, today, that you say you spent more than that time?

A Yes, sir.

Q And you would say twenty-five to

thirty days, is that what you are saying?

A Twenty-five to thirty days, just doing the lighting. I've made other trips out there putting up maybe one, or two lights.

Q So, your testimony is that you spent twenty-five to thirty days putting the lighting on that you talked about in your earliest testimony?

A Yes, sir.

Q When Mr. Kleppner was questioning you, is that right?

A Yes, sir.

Q And then you say, now, you made some additional trips, is that right?

A I told him about the lighting, yes, sir. But, I also told him that we had to go out there every day to check the generators and put the -- and check the lights, maybe one or two lights, maybe

change a bulb.

Q You personally, had to go?

A Not all the time.

Q You didn't go every day once it moved down there, did you?

A Once we completed the lighting, no, I didn't go every day.

Q In fact, if it was a simple task, you wouldn't go at all, would you, if it was easy work, or something somebody else could do, because of your particular skill and value, you wouldn't go at all, they would send somebody else?

A Not necessarily. We didn't know, no, I would have -- they would send a helper out there to run the generator.

Q But, the work of putting the lights on that you described took twenty-five to thirty days, is that right, sir?

A Yes, sir.

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BY MR. KLEPPNER:

Q Mr. Pizzitolo, to your knowledge, did the deckhands and the captains on the harbor tugs go home when their shift ended?

A Yes, sir.

THE COURT: Was that on a daily basis, or how long were their shifts, do you know?

THE WITNESS They worked twelve-hour shifts. After the end of their shift they would go home, sir.

BY MR. KLEPPNER:

Q Was your crew ever required to schedule or do preventative maintenance aboard the harbor boats?

A Yes, sir.

MR. CHARRIER: Excuse me, your Honor, I object to this, this is beyond

the scope of my cross.

THE COURT: Objection sustained.

BY MR. KLEPPNER:

Q Where did the requests for work on vessels come from?

A It came from Harvey, who is the head master, he would tell my foreman and then my foreman would tell us.

Q Do you know where Harvey got the request?

A He got it from the boat captain, he would report any difficulties or breakdowns to him.

Q When you went aboard the vessels, such as your harbor tugs, who directed you to the needed repair?

A The captain would tell me what the problem is. I knew the boats pretty well.

Q Were there any differences in the

amounts of work that you performed on vessels, or were required to perform, according to the seasons of the year?

A Yes, sir, we had --

MR. CHARRIER: Excuse me --

THE COURT: Objection overruled. I assume your objection to that, that was not covered on direct and I think --

MR. CHARRIER: Well, I am objecting by getting to it through the back door and objecting to something that might come by the back door that can't come in the front, if your Honor please.

THE COURT: No, the objection overruled, so far.

MR. CHARRIER: Thank you.

THE WITNESS: Could you repeat it, sir?

THE COURT: Was there a change in the amount of time that you spent on

vessels, depending on the seasons of the year?

THE WITNESS: Yes, sir, we had a slowdown period like in January or February, because of the cold weather up north and the river freezing and then we would do a lot of preventative maintenance on the vessels.

BY MR. KLEPPNER:

Q Was Mr. Benny Borden an electrician when you were hired at Electro-Coal?

A No, sir, Benny was a riverboat captain and he got promoted.

Q When the harbor tugs were in the fleet, as you talked about on direct, or on cross, was your crew ever required to work on it?

A Oh, yes, sir, we would get on boats and they would ride us down and do what they had to do and we would be down in

the engineroom or whatever, working on the vessel while it's in motion.

MR. KLEPPNER: Thank you, your Honor. I have no further questions.

THE COURT: You can step down, thank you, sir.

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BY MR. KLEPPNER:

Q You mentioned harbor boats, what harbor boats were available, were you involved with when you were at Electro-Coal, when Mr. Pizzitolo was there?

A We worked on the Electro-Coal boats.

Q Can you name those?

A The ELECTRA, BLAIR WILSON, JENNY HOWELL, AUDREY PEARSON.

Q Did those boats change at all, in other words, were they there throughout your period of employment with the company?

A Yes, sir, ever since I been there.

Q Were any other electricians assigned, besides your crew, to work on those four vessels?

A Everybody in the department worked on them.

Q My question, though, was anybody outside of the electrical crew of Electro-Coal charged with working on those boats, the electrical systems of those boats?

A Not that I know of.

Q Did you, personally -- were you personally required to work on those vessels at any time during your period of employment?

MR. CHARRIER: Your Honor, may I object to the leading question, he's talking about assignments, requirements, and suggestions and may I please object.

THE COURT: Go ahead.

MR. KLEPPNER: There was objection.

THE COURT: All right, counsel, please restate the question and please don't lead the witness. The objection sustained.

BY MR. KLEPPNER:

Q Mr. White, did you have any connection with these vessels, the harbor boats?

A I had to work on them.

Q What kind of work were you required to perform?

A We worked on winches, generators, spotlights, day tanks, as such, mainly anything electrical.

Q Do these boats leave the area of Davant at any time during your period of employment?

A With me on it, you mean?

Q No, just to be gone at all?

A Yes.

Q Do you know where they went?

A Well, they go up and pick up fuel barges and stuff like that.

Q Were you ever required to be aboard

these vessels while they were en route, in motion?

A No, not myself, no.

Q Do you know of anyone else in your crew that was?

A Not exactly, no.

Q When you say not exactly, what do you mean, please explain.

A I've known some to take trips, you know, when they did move.

Q Was Mr. Pizzitolo -- do you know, personally, whether he was ever required to work on these boats, the harbor boats, I am speaking of?

A Yes, he did work on them.

Q Do you know whether he worked more or less than you did aboard these boats?

A Definitely more.

Q Do you have any idea, can you tell the jury how much more he worked than

you?

A I say he worked at least two times more than what I did.

Q Do you, personally, know why that was so?

A Mr. Pizzitolo knew the harbor boats, he knew the generator systems and he is a good electrician.

Q When members of your electrical crew worked aboard these vessels, was there any requirement for dress or clothing?

A No, sir.

Q Was there any safety devices that you are required to employ?

A Not that I know of.

Q Did you wear a hard hat?

A Oh, yes, hard hat and life jacket.

Q Were there any other boats that were part of a group of boats that worked with the Electro-Coal operation?

A Like Mid-South boats?

Q What were these?

A I think they are the push boats, river boats.

Q Do you know the names?

A I think the BETTY WOOD, the MARSHA LYNN --

THE COURT: You have got to keep your voice up, I can't hear you and I am sure you can speak louder than that. It will help us if you will, sir.

THE WITNESS: MARTHA LYNN, the BETTY WOOD, I am not sure of the other boats.

BY MR. KLEPPNER:

Q What did those boats do?

A They pushed coal tows from wherever they got them at into Electro-Coal, they brought tows in.

Q Were members of the electrical crew at Davant ever required to work on these

boats?

A Yes, sir.

Q Were there any other classification of boats that were employed in Electro-Coal operation?

A Gulf Coast.

Q What were those boats?

A Oceangoing vessels.

Q Can you tell us the name of those vessels?

A LIBBY BLACK, I think BETTY CULBREATH, BETTY WOOD. I am not sure of the rest of them, either.

Q Did any members of the electrical crew of Electro-Coal, were they ever required to work on these boats, on the electrical systems?

MR. CHARRIER: Your Honor, I object, this is the third time, whether they worked or required, that's --

MR. KLEPPNER: All right, let me rephrase, your Honor, I will withdraw the question.

BY MR. KLEPPNER:

Q To your knowledge, did any members of the electrical crew work on those boats?

A Yes.

Q Did the harbor tugs that you mentioned have any electricians -- let me withdraw that question.

Will you state for the jury what personnel were aboard the harbor tugs when they were en route, or in motion.

A When they go upriver?

Q Yes.

A Captains, deckhands.

Q Were there any electricians assigned to them, besides your crew?

A Not assigned, no.

Q Were there any barges used by Electro-Coal in their operations?

A Yes.

Q Did any of those have electrical systems?

A Yes.

Q Did any members of your electrical crew, or of Electro-Coal, perform work on those barges during your time of employment in conjunction with Mr. Pizzitolo?

A It was a barge called CARGO ONE, yeah.

Q Would you tell the jury about that work, please -- first of all, what was CARGO ONE?

A It was a big barge with cranes on it. It was used to unload barges into ships.

Q Where was it located?

A Down in the lower fleet.

Q Where was the lower fleet?

A About a half mile to a mile below the docks at Davant.

Q In what body of water, if any?

A The Mississippi River.

Q Now, were there any electrical systems on CARGO ONE?

A Yes, sir.

Q Do you recall when CARGO ONE joined Electro-Coal's operations?

A I am not sure of the exact date, no.

Q Do you have the approximate date that you can give the jury?

A I think it was around '80, or '81.

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BY MR. KLEPPNER:

Q Mr. White, did the barges that you mentioned, CARGO ONE barge, were there any other barges that Electro-Coal had or utilized in the course of its operations?

A Not that I know of.

Q How was the coal transported across the ocean, do you know?

A Yes, ocean barges, yes, sir.

Q Do you know what the names of those ocean barges were, or is?

A The MARIE FLOOD, I think the PEARL G. JAHN, BARBARA VAUGHT, LOUISE KIRKPATRICK, I think that was it.

Q Now, did these barges have electrical systems?

A Yes, they have generators.

Q Was your crew required to do any maintenance work, or did any member of

your crew perform work or maintenance aboard these vessels, these barges?

A Not to my knowledge, I don't remember.

Q What were the river harbor tugs used for?

A They bring coal tows in from the lower fleet and change them out at the docks and bring the empties and all to the upper fleet.

BY MR. KLEPPNER:

Q Mr. White, where did the captains and the deckhands on the harbor boats live when they weren't operating their boats?

A Electro-Coal boats?

MR. CHARRIER: Your Honor, that's beyond the pale --

THE WITNESS: At home.

THE COURT: Objection overruled.

THE WITNESS: At their homes.

MR. KLEPPNER: I am sorry?

THE COURT: At their homes.

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BY MR. KLEPPNER:

Q What vessels?

A We have some harbor tugs.

Q What are their names?

A M/V JENNY HOWELL, BLAIR WILSON, the ELECTRA and the AUDREY PEARSON.

Q Were you employed at Electro-Coal in the electrical department when Mr. Pizzitolo was employed there?

A Yes, I was.

Q Were those harbor tugs part of the operations at that time?

A Yes, sir.

Q What work, if any, did you ever perform aboard the harbor tugs?

A Well, we pulled maintenance on generators, we did some wiring, emergency repair work, just generally maintained the boats.

Q Did any other electricians, other than from the Electro-Coal electrical crew, maintain those boats electrically?

A No, sir.

Q Were you ever required to work aboard these boats when they were underway?

A Yes.

Q I've asked you about what you were required to do, do you know what Mr. Pizzitolo was required to do?

A More or less the same thing.

Q Were there any other vessels that operated or were a part of the Electro-Coal operation?

A If --

MR. CHARRIER: Excuse me, Mr. Rice.

Your Honor, may I object, unless there is some predicate. Counsel, on several occasions, referred this to this

as the electrical operation. Yet, to bring any witness who is knowledgeable.

THE COURT: I understand your objection, it's overruled.

MR. CHARRIER: Thank you, sir.

BY MR. KLEPPNER:

Q Could you answer the question, please, Mr. Rice.

A Okay, you're talking about other boats that have come to Electro-Coal, is that --

Q That participated in the operations that Electro-Coal was involved in.

A Well, we have the push boats that pushed the barges down from the coal mines and then we have the ocean tugs that take the ocean barges to Tampa.

Q Do these vessels have any electrical systems aboard?

A Yes, sir.

Q Do you, yourself, or members of your crew, ever perform any electrical maintenance, or work aboard these vessels?

A Yes.

Q Were there any barges involved with the Electro-Coal operations?

A We had one barge, big barge that maybe I am -- if I read you correctly, what you are asking about is CARGO ONE?

Q I asked you about any barges, were there any barges?

A Yes, sir.

Q What was CARGO ONE?

A It was a barge with two cranes on it.

Q And when was it involved with the Electro-Coal operation at Davant?

A I am not really sure of the year it was, I think it was around 1980.

Q About there, or '79?

A Or '79, or '80, I believe.

Q Were there any electrical systems aboard this barge?

A Yes, sir, they got generators.

Q Did you have occasion to work on that barge, on its electrical systems?

A Yes, sir.

Q Did any other members of your crew, including Mr. Pizzitolo, have occasion to work on that barge?

A Yes, sir.

Q Can you tell the jury what was required, or what work was performed?

A Well, when we received the barge there was no lights or anything like that on the barge, so we had to put lights so that the cranes could see what they were doing, you know. But, where they put them was on the outside deck of the barge

and we ran several different systems before we got something that finally worked.

Q Did you participate in that work?

A Yes, sir.

Q How long did it take?

A Well, there was three different times that we had to change lighting systems. The first time we ran it like an extension cord cable, and that took about three, or four days, I think, and that didn't last, so we had to go back with conduit, I believe. And then, they knocked that down and we come back with conduit again and we finally covered that with angle iron so that that would last.

Q Where was all that work performed?

A On the barge.

Q Where was the barge when that work was performed?

A On the river.

THE COURT: What year was that, when was that done?

THE WITNESS: I believe that was '79, or '80, sir.

BY MR. KLEPPNER:

Q Did you ever have occasion, after those projects, to perform any work or maintenance, electrically oriented, on that barge? When I say you, I mean you, or any member of your crew.

A Perform work?

Q Yes.

A Yes, sir.

Q What sort of work?

A Well, we would replace the lights. The cranes, when they would swing, would generally destroy the lights, so we had to replace several lights and do maintenance on the generators,

maintenance on the lighting inside the little cabin.

Q Where was all of that work performed?

A On the barge.

Q Where was the barge when all that work was performed?

A In the river.

Q Was any other person, other members of your electrical crew charged, or not charged with, did any other persons, other than members of your electrical crew, during your time with the company, perform electrical maintenance and work aboard CARGO ONE?

A I don't recall anybody else working on it.

Q Were you ever required to work aboard the harbor boats when they were underway, in motion?

A Yes.

Q Did that occur at any time when Mr. Pizzitolo Was employed at Electro-Coal?

A Yes.

Q Did you ever take meals aboard any of the boats that you ever worked upon?

A Yes, sir.

Q When and which ones?

A The push boats, that's the river boats, not the harbor tugs, but the big river barges, or river boats would usually feed us if we were working there.

Q What other personnel worked with the harbor boats, besides your electrical crew?

A The mechanical crew.

Q Who were they?

A Well, the welders and the fitters and the diesel mechanics.

Q What about the movement of the

boats, who handled that?

A Well, that was Harvey.

Q Okay, but let's take a given tug, the ELECTRA, who ran the boat?

A You mean the pilot?

Q Well, is that who it is?

A Right.

Q When the boat was in motion, who usually was aboard?

A The pilot and the deckhand.

Q If there were electrical problems, who was usually aboard?

A The pilot, the deckhand and the electrician.

Q Where did the pilot and the deckhand go at the end of the shift, where did they stay?

A I am not sure I follow you -- they went home.

Q Did they sleep aboard the boat?

A No.

Q Did the electrician sleep aboard the boat?

A No.

Q When you were working on CARGO ONE, where did you take your meals?

A Well, that was generally we ate in our lunch room, we got stuck out there or we knew we were going to be out there for any length of time, we would eat on the barge.

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BY MR. KLEPPNER:

Q Would you describe what items of equipment, without going into tremendously minute detail, that was involved, that you and your crew, and specifically Mr. Pizzitolo, were involved with electrically during your employment with Electro-Coal.

A We worked on all phases of electrical equipment. We worked on the various vessels on the terminal, we worked motors, starters, electrical motors, controls, lights, switches, on the engines. We worked the fuel pressure switches, the temperature switches. We used monitoring systems, we installed them, we did everything to the system that had any kind of electricity or

electrical components to them, sir.

Q You mentioned vessels, what vessels did you do work on?

A All the vessels that were moored, or used at Electro-Coal, sir.

Q Can you name any of those?

A Yes, sir, with Mid-South, we did all the big white line boats, we used the-- I believe they were the GIRLIE KNIGHT, the JULIA WOODS, the ELEANOR GORDON, the MARTHA LYNN, at Mid-South Towing. The Mid-South Towing vessels were the line boats. The Mid-South boats that were stationed at the terminal, itself, we had the BLAIR WILSON, the JENNY HOWELL, the AUDREY PEARSON, the ELECTRA, and the BLAIR WILSON.

Q Let's start with the last group you mentioned, the harbor tugs that were stationed there, what work did you

perform or did the crew that you had knowledge of, the electrical crew perform on those vessels?

A We worked on everything, sir.

Q Can you describe for the jury what systems involved electrical work aboard those four vessels?

A The vessels could not work at all, could not even function as a unit without the electrical systems. We had electrical motors that turned on the hydraulic pumps, we had electric motors that drove the air compressors. We had the lighting, the controls, the alarm systems we call the enunciators. We worked the fire systems. We worked all the associated lighting, controls, just about anything on the boat that had electrical wires to them, we maintained and worked on, worked on regularly.

Q Did anyone else, during the course of your employment at Electro-Coal, do electrical work aboard those harbor tugs?

A Not to my knowledge, sir.

Q Did you ever have to work on these vessels when you were underway?

A Yes, sir, I sure did, sir.

Q To your knowledge, did Mr. Pizzitolo, or other members of the crew, work aboard these vessels when you were underway?

A Yes, sir, it was, more or less, a normal routine thing we did, sir.

Q What, if any safety equipment were you required to wear when you were aboard these vessels?

A Just a hard hat and life preserver, sir.

Q Do you know why you were required to wear a life preserver?

A It was a stated commitment any time we went over the levee to maintain hard hat. Well, we had to maintain hard hats all the time, but anything over the levee system we had to wear our personal safety device and our life jackets.

Q Do you know why that was required?

A No, sir, I didn't question why, it seemed logical to me, sir.

Q Why was it logical?

A Well, you working over water, if you fell or slipped, or hit your head, you had some means of flotation.

Q Who, from time to time, did you receive your orders from when you were required to work aboard vessels?

A Manuel Guerra, the electrical foreman, Carl Rotolo, who is assistant foreman, sir.

Q Well, let me ask you, was your work

aboard these harbor tugs which you would classify regular, occasional, or routine, or any other term you would like?

THE COURT: Objection sustained.

BY MR. KLEPPNER:

Q Do you have any idea of how often you were required to work aboard the harbor tugs?

A On the average, I would have to say once, or twice a week on the average, sometimes more, sometimes a little lesser.

Q Were there any other vessels that you were required to work aboard?

A We did work on the Gulf Coast transit vessels.

Q Which were these, do you recall the names?

A The LIBBY BLACK, the ELLINA HICKS, the CATHERINE CLEWIS, the BETTY

CULBREATH. I am not sure of the rest of them, sir.

Q Did these vessels have electricians aboard?

A No, sir, they did not.

Q Were there any other vessels involved with the Electro-Coal operation that you worked aboard, or your crew members?

A I am not sure on that, sir.

Q Were there any barges involved with the Electro-Coal operation that you worked aboard, or your crew worked aboard?

A Yes, sir, it was CARGO ONE, sir.

Q Could you tell the jury what, if anything, you did on that?

A CARGO ONE took us, looked like a converted ocean barge that they had mounted cranes on, sir, and we maintained

the onboard lighting and the generation system for the lighting on that particular vessel.

Q What kind of work did you do aboard the river tugs?

A Routine maintenance and preventative maintenance, sir.

Q Did you ever take meals aboard any of the vessels that you worked aboard?

A Yes, sir, regularly when I worked on line boats, sir.

Q What do you call a line boat?

A The big white push boats that brought the coal down from the mine down to the terminal, sir.

Q Was there any work beyond regular maintenance that you ever did on those line boats?

A In what aspect, sir?

Q Any kind of aspect, any sort of

electrical work?

A Sure, yes, sir, on several occasions we were asked or told, not really asked, we were directed to go out and install ship-to-shore power reduction transformers on the line boats. I worked with Mr. Sonny Aguillar, who was the plant electronics repair person, that we went around a couple of times changing receptacles around where you could change the scanners. I, personally, along with Nick Pizzitolo, we put in, I believe it would be the better term would be collision avoidance systems to free the pilot up so when if he ever got into a position of a collision, all he would have to do is hit a particular button or a knob on the dashboard of his console which would automatically throw the vessel with the big blast on the air horn

into a condition which would tell all the vessels that a collision is imminent and he could free his hands up to take evasive maneuvers with his rudders and his tillers.

Q Do you know how long that project took you?

A Very first vessel we had to feel our way around it, took us about three consecutive days.

Q Were these vessels afloat, or on drydock when you did this work?

A They were in the river, sir, tied up.

Q And the barge, the CARGO ONE, I may have already asked you this, was it afloat?

A Well, it was moored about a mile or mile and a half down from the terminal, sir.

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BY MR. CHARRIER:

Q In fact, sometimes days passed and sometimes weeks passed when you didn't work on the vessels?

A Not really, sir. When we used the MV -- well, around the dock which is "unconditioned maintenance boats" you would get on it to go, say bring materials from the finger dock to the No. 2 dock. When your illustration where the unloading cranes were, it would be numerous times the boat captain would holler out, mind coming up here looking at my switch for me, you know, even though it would be a minor problem, you'd still do some aspect of a repair job, even at that time you were not really assigned to do a job. It was just common

nature, we tried to help everybody else out, they helped us out. We needed a harbor boat, they would come pick us up. But, when I were running they had a problem, we tried to repair it for them with minimum down.

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BY MR. CHARRIER:

Q You mentioned some work that was done while you rode the boats, you were referring, I presume, to riding the boats when you left from the dock and went to the upper fleet, or the lower fleet, on either one of the line boats, or on the oceangoing tugs?

A No, sir, it was line boats, or the - I have did both the line boats which are the big white push boats and the harbor boats, sir, I have worked on while under tow.

Q But, you have worked on them while they were there in the area of the dock, is that right, sir?

A Yes, sir, and I have worked on in transit upriver.

Q That was on occasion when you got caught on the AUDREY PEARSON, which is one of the larger boats and you didn't know it, you were working below deck and she was bound north in the river at the time that Hurricane Frederick was coming on, is that right?

A Correct, sir.

Q That was the only occasion that you ever got a ride north up the river on one of the harbor boats, is that right?

A Correct, sir.

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BY MR. CHARRIER:

Q Who would be calling?

A The boat captain, or the harbor master.

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BY MR. KLEPPNER:

Q Mr. Guerra, would you tell the jury the names of the harbor tugs when Mr. Pizzitolo worked for your company.

A The ELECTRA, JENNY HOWELL, AUDREY PEARSON and BLAIR WILSON.

Q During that period of time, there was no other group, or crew, responsible for the electrical maintenance and repair of those vessels, other than your crew, was there?

A No, sir, we took care of whatever work was required.

Q Speaking, now, of the harbor boats, are you familiar with the front winches?

A Yes, sir.

Q They are electrical, aren't they?

A Sure.

Q What do they do?

A They tie the push boats to the barge.

Q The function of the push boat is to maneuver the barges into place for loading and unloading, isn't it?

A That's correct.

Q Would you agree that without the barges in position, Electro-Coal's operations could not continue, would that be correct?

A Since the cargo is in the barge, yes, sir.

Q And the four harbor tugs were the motivating power for those barges, is that correct?

A That's correct.

Q These winches that were electrical, were the tools by which these barges were hooked up and moved, were they not?

A Yes, sir.

Q And if these winches weren't working, the barges wouldn't get moved, would they?

A Unless you do it manually.

Q How would you do it manually?

A Tie ropes on them.

Q Was the operation at Electro-Coal twenty-four hours a day?

A Twenty-four hours a day.

Q Was there deck lighting on these harbor boats?

A Yes, sir.

Q Was that electrical?

A Yes, sir.

Q Your crews maintained that?

A The deckhand would change some of the light fixtures. When there was a problem with the fixtures, then we would repair it, yes, sir.

Q And to back up to those winches, did your crews maintain those winches?

A When we were called, yes, sir.

Q Did they check the blocks, what we call the blocks and brakes on these winches?

A If they had to repair them, they would check them.

Q As a matter of fact, that was a common problem with these winches, wasn't it?

A You could call it a problem, yes.

Q Did you perform the maintenance and work aboard the harbor vessels, yourself?

A Years ago, when I had my tools, yes, sir.

Q When did you stop doing that?

A When I became a supervisor.

Q How long before Mr. Pizzitolo left did you stop doing that?

A Oh, I don't know from time to -- I would grab a tool or two and refamiliarize myself with it. But, I hadn't worked with my tools since I've been a supervisor.

Q Give us the date, again, please, when you became a supervisor.

A In '73.

Q So, from 1973, until Mr. Pizzitolo left in March, of 1982, you seldom worked aboard vessels with tools, is that correct?

A From time to time, I would, but I wouldn't work with my tools, I would be with them.

Q Most of the time, however --

A Most of the time.

Q An electrical crew was sent to the vessel to do the job and you stayed on shore and told them where to go to it?

A That's correct.

Q Looking again at these harbor boats, in addition to the front deck winches, the deck lighting, is it not true that you had read deck refueling station that required maintenance and repairs?

A Yes, sir.

Q And also were there hydraulic pump starters that control the steering of these vessels?

A Steering of the vessels, yes.

Q Now, if these vessels couldn't be steered, were they able to move the barges into place?

A Not at all.

Q There were day fuel oilers involving starters and sensors, were there not, aboard these vessels?

A Pardon?

Q Were there day fuel oilers that had

starters and sensors aboard these vessels?

A Yes, sir.

Q These were electrical, were they not?

A Yes.

Q And your crew maintained them and repaired them regularly, did they not, is that correct?

A Yes.

Q There was a day water tank, engineroom lighting, is that correct?

A That's correct.

Q All electrical controlled, right?

A That's correct.

Q All required maintenance and repairs by your electrical crew, did it not?

A Yes.

Q There were, also engineroom-- correction, starboard and port

generators, weren't there?

A Yes, sir.

Q With controls.

A Regulators, yes, sir.

Q Now, these generators required periodic cleaning out and washing down, did they not?

A From time to time when they needed it.

Q That's a common problem with generators, isn't it?

A In some cases it was, yes, sir.

Q Well, let me ask you this, sir, when a generator runs for a certain period of time, does it not reach a point when it requires cleaning, new brushes?

A Yes, sir.

Q Wouldn't you consider that routine maintenance?

A If it agrees with the manufacturer's

recommended period of, you know, inspection, or whatever it is.

Q In other words, sometimes it would happen sooner and sometimes later than the manufacturer guessed, is that right?

A That's right, probably sometime it would.

Q But, it's bound to happen?

A Sooner or later.

Q Whenever it happened, your electrical crew had to do it, they had to repair it?

A That's correct.

Q Not to belabor the point, I am just going to read to you a list of additional ones to those I just gave you and I will ask you if you agree all these electrical systems were aboard the harbor boats and required your crew's attention for maintenance and repair. I will read this

list to you and I will ask you to tell me among them any that did not: air compressors and controllers, alarm units.

THE COURT: I'm going to tell you just like I told Mr. Charrier, don't make your list long, because anything that's electrical on the boat the man said occasionally his people would have to do some work on. Just like I cut him off, didn't let him describe every electrical motor in the plant, we could be here for weeks. I am not going to let you talk about every electrical thing on the vessels. So, just suffice it to say those things on the vessels your people did some maintenance on.

BY MR. KLEPPNER:

Q With a shutdown electrical system aboard a harbor tug, could it carry out its function of moving the barges,

holding them in place and holding boats and ships in place, let's say, first of all, after dark?

A I didn't understand the question?

Q With the electrical system shut down, if the electrical system in your harbor boats failed, went out, failed completely, could those harbor boats move barges around at night or hold ships in place at the dock for loading?

A No, sir, it would be inoperative.

Q Mr. Guerra, there were times, were there not, when your crews were required to perform maintenance, or repair tasks aboard harbor boats when they were underway?

A There were if they were minor repairs, like light fixtures, or something in the pilot house, or if it was major, they would have -- we had to

establish a policy that if it was a major deal they would have to tie the boat up.

Q But --

A You are finished your answer?

A But, if it was something minor, they probably could do it on the way.

Q But, you weren't out there every time your crews went out there to see whether they did it, whether underway, or not?

A Well, it was company policy and it's supposed to be established.

Q If any of your employees, or former employees testified that despite company policy, frequently repairs were made while vessels were underway, would you agree that that could be possible?

MR. CHARRIER: Your Honor, I object to asking the witness to comment on somebody else's testimony, it's an

improper question.

THE COURT: No, the objection overruled.

THE WITNESS: Sir, could you refresh my memory?

THE COURT: If someone else has testified, some other former employee, that on occasion they did work when a vessel was underway, other than the minor work that you described here, are you in position to say whether that's accurate, or not?

THE WITNESS: I have no way of telling what they did.

BY MR. KLEPPNER:

Q Because you weren't aboard?

A That's correct.

[183]

[183]

BY MR. KLEPPNER:

Q You were asked by Mr. Charrier whether or not your electrical crew punched time clocks when they came on duty and left, were you not, do you remember that question?

A Yes.

Q To your knowledge, did the captain and deckhand aboard the harbor boats punch time clocks when he came on duty, or when they left?

A I am not aware of that department's procedures.

Q They did go home to their homes when they finished, just like your electrical personnel did, didn't they?

A The boat captains did, yes.

Q How about the deckhands?

A The deckhands, too.

Q With regard to the river tugs, the white boats, the line boats, I think they are called, is that right?

A Yes, sir.

Q When they were in your area, the Davant area, is it not correct that electrical problems were referred to your crew to be dealt with?

A If the chief engineer and assistant engineer could not handle it, or needed assistance, or parts.

Q Neither the chief engineer, nor assistant engineer were electricians on these boats, were they?

A Not electricians as we are classified.

Q There were no electricians aboard these boats, except your people, when they went aboard, when the ship was in

the Davant area, were there?

A When they were called upon yes, sir.

Q And frequently, tell me this, at times when your electricians went aboard these line boats, were they not fed a meal?

A When they went by, yes, sir.

Q The river tugs were specifically identified, weren't they, as the ELEANOR GORDON, the JULIA WOODS, the MARTHA LYNN, the GIRLIE KNIGHT, is that right?

A Yes, sir.

Q That was the fleet, is that right?

A That was the fleet, yes, sir.

Q And the fleet of ocean tugs, that consisted of the LIBBY BLACK, the BETTY WOOD, the ELLINA HICKS, the SARAH HAYES, the BETTY CULBREATH, and the CATHERINE CLEWIS?

A That's right.

MR. CHARRIER: Just a minute, your Honor, I object to counsel using this word in this context, in a legal context which is precisely what counsel has characterized the fleet, suggesting that

--

THE COURT: Well, the objection is overruled.

MR. CHARRIER: Thank you, sir.

BY MR. KLEPPNER:

Q That was the fleet of ocean tugs, wasn't it?

A Yes, sir.

Q These two groups, or fleets of vessels, the river tugs and the ocean tugs all functioned as part of the moving operation of Electro-Coal, did they not?

A Yes, they carried coal to and from Electro-Coal. —

Q When the ocean tugs were in the Davant area, and experienced electrical problems, your crew was sent aboard to correct it, was it not?

A At times, yes, sir.

Q And those ocean tugs did not have any electricians aboard, did they, other than your crew?

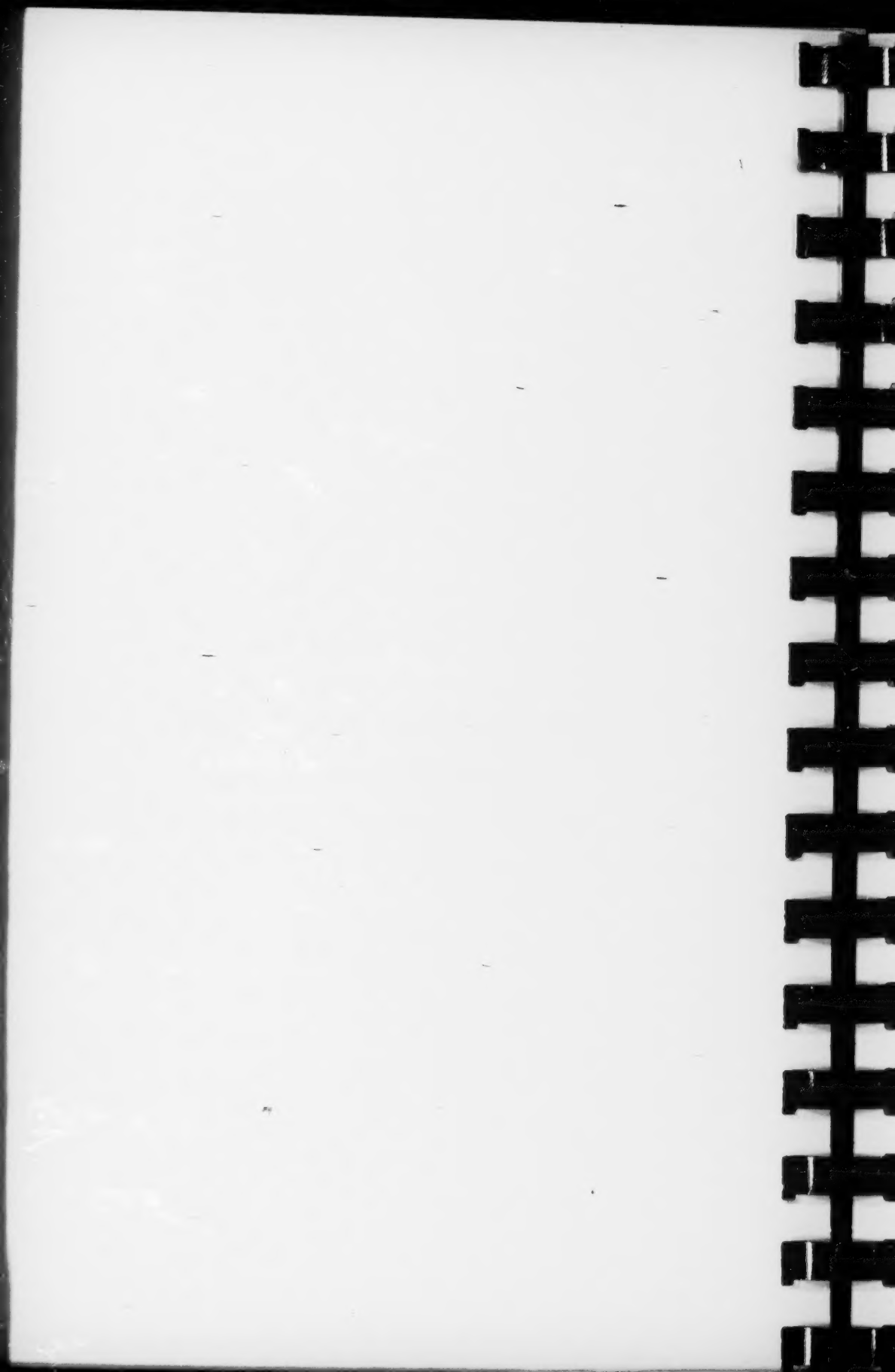
A No, sir, just the engineers and assistant.

APPENDIX " H "

ORDER EXTENDING TIME TO FILE PETITION

FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES



SUPREME COURT OF THE UNITED STATES

NO. A-256

NICHOLAS R. PIZZITOLO,

APPLICANT

V.

ELECTRO-COAL TRANSFER CORPORATION

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

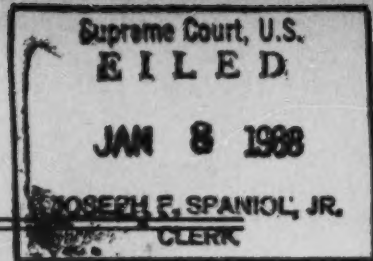
UPON CONSIDERATION of the
application of counsel for petitioner,

IT IS ORDERED that the time for
filing a petition for writ of certiorari
in the above-entitled cause be, and the
same is hereby, extended to and including
November 4, 1987.

/s/ Byron R. White
Associate Justice of the
Supreme Court of the
United States

Dated this 29th
day of September, 1987.

(2)
No. 87-737



In The
Supreme Court of the United States
October Term, 1987

— o —
NICHOLAS R. PIZZITOLO,

Petitioner,

vs.

ELECTRO-COAL TRANSFER CORPORATION and
NATIONAL UNION FIRE INSURANCE COMPANY,

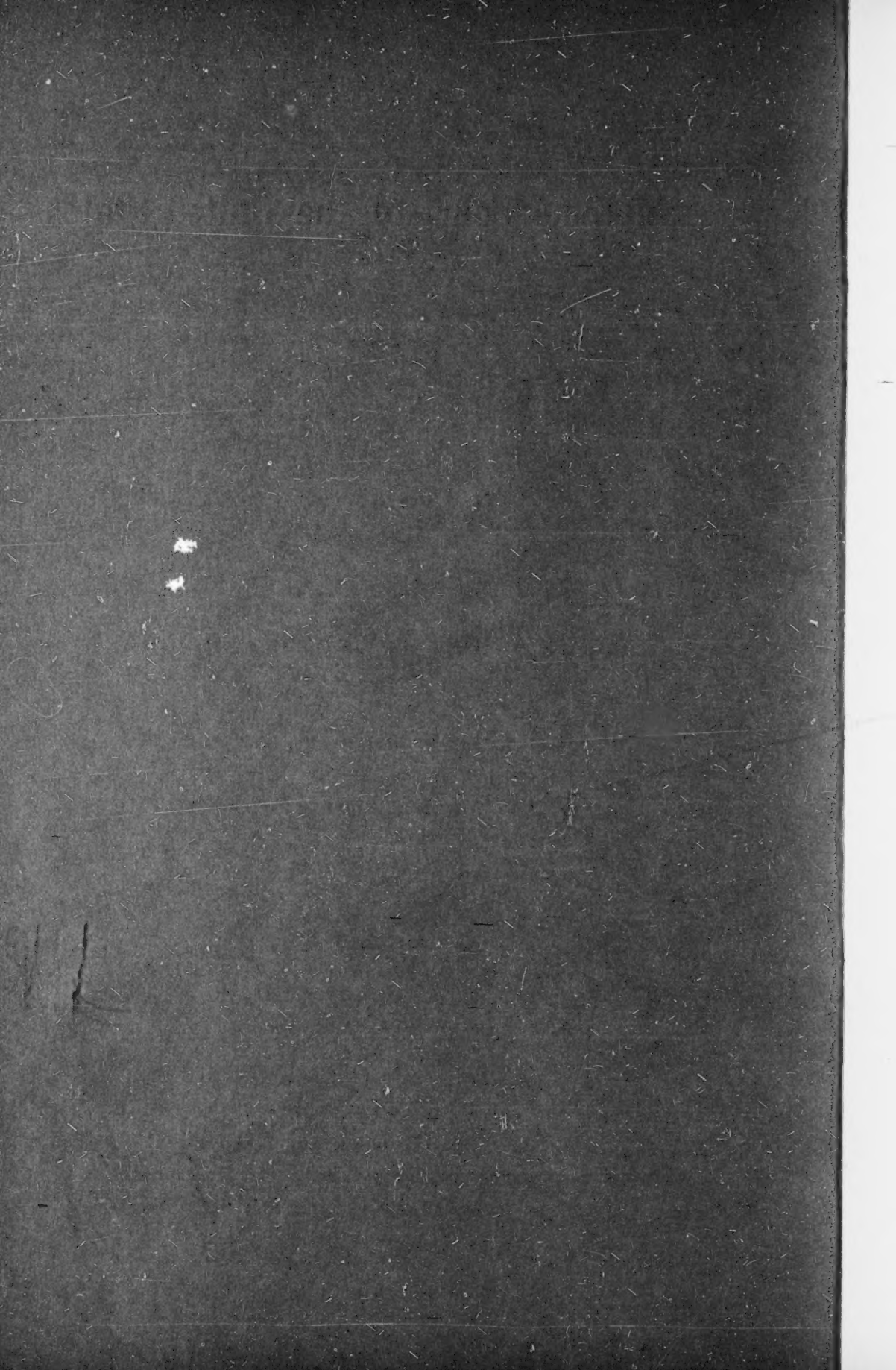
Respondents.

— o —
**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

— o —
RESPONDENT'S BRIEF IN OPPOSITION

— o —
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QUESTION PRESENTED

Whether the Court of Appeals for the Fifth Circuit was correct in affirming the District Court's judgment notwithstanding the verdict on the issue of Petitioner's lack of seaman status for the purpose of asserting a remedy under the Jones Act, 46 U.S.C.A. 688.

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STATEMENT OF THE CASE

The facts of the case are stated in the opinion of the Court of Appeals, 812 F.2d at 978-979 (Petitioner's Appendix A, pp. A-6 through A-9).

REASONS FOR DENYING THE WRIT OR ALTERNATIVELY, FOR SUMMARY DISPOSITION AFFIRMING THE DECISIONS OF THE COURTS BELOW

- I. Petitioner has not demonstrated any "special and important reasons" warranting the exercise of this Honorable Court's discretionary power of review, as described in U.S. Sup.Ct.Rule 17, 18 U.S.C.A.
- II. The decisions below are in full accord with the principles expressed in decisions of this court, and the Court of Appeals correctly interpreted the Longshore and Harbor Workers Compensation Act (LHWCA) in holding that coverage under the LHWCA and the Jones Act is mutually exclusive.
- III. The decision of the court of appeals is correct as supported by the leading case on the issue of seaman status, *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959), and its progeny.

ARGUMENT

I. No Special and Important Reasons Exist to Grant Certiorari

Noticeably absent in Petitioner's papers is any direct statement of the "special and important reasons" which

ordinarily ought to be offered in support of this Court's discretionary power of review. U.S. Sup.Ct. Rule 17, 18 U.S.C.A. Such reasons are absent from the petition and absent in fact. Certainly there is no conflict among the federal courts of appeal on this issue; neither does this case present an undecided question of federal law; nor does the decision of the Court of Appeals conflict with applicable decisions of this Court.

While Respondent recognizes that the reasons enumerated in Rule 17 are not unqualifiedly controlling and do not fully measure this Court's discretion, implicit in Rule 17 is the directive that there must be reasons of similar character to warrant the granting of certiorari. This Court has described the necessary reasons as follows:

A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [Citations omitted.] Special and important reasons imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed. 897 (1955). Certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties," and where "there is a real and embarrassing conflict of opinion and authority

between the Circuit Courts of Appeal.” *Id.* at 79, quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712 (1923).

Reasons similar to those described above are absent in this case. Instead, the petition apparently rests on the grounds that (1) since in most cases questions of seaman status should be determined by the jury, and (2) since in this case the trial judge allowed the jury to consider the issue, and (3) since, thereafter, the trial judge granted a judgment notwithstanding the jury’s verdict, the jury verdict had a sanctity beyond the reach of settled law. However, it is plain that status issues come in for no special treatment on motions for directed verdict or judgment n.o.v., and such a motion is well taken when there is no reasonable evidentiary basis for the jury finding. *Senko v. La Crosse Dredging Corporation*, 352 U.S. 370, 374, 77 S.Ct. 415, 1 L.Ed.2d 404 (1957); *Golden v. Rowan Companies, Inc.*, 778 F.2d 1022 (5th Cir. 1985); *Wallace v. Oceaneering International*, 727 F.2d 421, 431-432 (5th Cir. 1984); *Boeing Company v. Shipman*, 411 F.2d 365, 374-375 (5th Cir. 1969) (en banc).

This Court has long held that the mere right to jury trial does not negate the authority of the federal courts to direct a verdict or enter judgment n.o.v. for insufficiency of evidence. *Galloway v. United States*, 319 U.S. 372, 389, 63 S.Ct. 1077, 1086, 87 L.Ed. 1458 (1943); *See also, Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); *Colgrove v. Battin*, 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973). Although Petitioner asserts otherwise, a jury’s discretion to find a worker “a member of a crew” is no greater than its discretion to

decide any other factual issue. In short, no case of this Court suggests that jury verdicts on status have greater sanctity than jury decisions of any other issue.

Indeed, this Court recently denied certiorari where precisely the same issues presented here were at stake. In *Munguia v. Chevron Company U.S.A.*, 768 F.2d 649 (5th Cir. 1985), *cert. denied* 475 U.S. 1050, 106 S.Ct. 1272, 89 L.Ed.2d 580 (1986), the plaintiff was employed as a roustabout in an oilfield consisting of six platforms located near the Mississippi River and accessible only by water. A number of small vessels provided transportation for workers and equipment in the field. Munguia's duties included working at a group of oil storage tanks called a tank battery. When he was not assigned there, he was required to work on the actual oil wells which also were only accessible by boat. Munguia traveled to the wells by boats which he piloted and for whose maintenance he was sometimes responsible. As in this case, the percentage of time spent by Munguia working on vessels, as opposed to land-based work, was an important consideration. Although the plaintiff testified that more than 90% of his activities involved piloting and working with the boats, his testimony was contradicted by other witnesses.

The jury found that Munguia was a seaman and rendered judgment in his favor. The District Court entered judgment n.o.v., the Fifth Circuit affirmed, and this Court denied certiorari. *Munguia*, 475 U.S. 1050. The Court of Appeals based its decision on the fact that the plaintiff's assignment to any particular vessel was random, was not on a continuing or regular basis, and was not substantial in point of time and work. In affirming the judgment notwithstanding the verdict, the Fifth Circuit stated:

The jury might have found, that as contended by Munguia, his work required the ability to pilot a small boat and "more than rudimentary" knowledge of the operation and maintenance of the craft, that he had to know about currents in the river to navigate properly, and that he faced the vicissitudes of storm, injury and death while on the waters he traveled. But these are not the specific criteria by which it is determined that a worker is a member of the crew of a vessel. The *Robison* criteria are threefold: whether the worker performs a substantial amount of his work aboard a vessel; whether he is assigned more-or-less permanently to a vessel or identifiable fleet of vessels; and whether his duties contribute to the mission of the vessel.

Munguia's work fails to meet at least two of three criteria: (1) he was not assigned to a fleet of vessels: instead the vessels were randomly assigned to him as a means of performing his work of servicing platforms and (2) he did not perform a substantial part of his work on the vessels. 768 F.2d at 653.

Likewise, as is more fully discussed in Section III, *infra*, Pizzitolo was not a member of the crew of any fleet of vessels. Rather, he was a land-based worker assigned to perform electrical repairs on any and all electrical equipment on the premises of Electro-Coal's facility, and only 25 percent, at most, of his work consisted of electrical repairs on vessels.¹ Understandably, Petitioner makes no reference to this Court's refusal to grant certiorari in *Munguia*. The case does, however, control this one: Judgment n.o.v. is

¹ See also, *Miller v. Rowan Companies, Inc.*, 815 F.2d 1021 (5th Cir. 1987) in which the Fifth Circuit affirmed a judgment n.o.v. on the ground that the plaintiff failed to present a sufficient evidentiary basis for the jury to find that he was permanently assigned to, or performed a substantial part of his work on, the vessel.

indeed proper in status cases and none of the "special and important reasons" required by Rule 17 exist here. This Court should refuse certiorari.

II. The Decisions Below Do Not Conflict With the Decisions of This Court.

In seeking certiorari, Petitioner asserts the Court of Appeals engaged in "semantical distinction" and glaring and grievous misinterpretation when it found him covered by the Longshore & Harbor Workers Compensation Act, 33 U.S.C. § 901, et seq. (LHWCA), and not by the Jones Act. Hardly so! The Court of Appeals simply found that Pizzitolo was a traditional harbor worker and plainly fell in that category of laborer which the Act expressly identifies as a "ship repairman". Petitioner, after all, was a shore-based worker whose major assignment was maintenance of a shore-side plant and who only performed electrical repairs on vessels from time to time.

In this Court, Petitioner, as he did with the jury, narrowly focuses on certain isolated facts, choosing to present only those facts which emphasize his connection to the vessels he sometimes repaired. Petitioner's argument is reminiscent of the Indian folktale of the six blind men and the elephant. Each, unable to see the whole, made a limited examination of the elephant's anatomy and gave a wrong description. The District Court, constrained as it was by law to see with a full focus, rejected the narrow bead Pizzitolo drew on the facts and granted judgment n.o.v. The Fifth Circuit Court of Appeals correctly affirmed that ruling. It correctly also found that, in any event, viewed from any vantage point, Petitioner was a traditional harbor worker statutorily defined by ~~the~~ LHWCA as a ship

repairman, and one who, therefore, was not covered by the Jones Act.

The decision below is correct and is in full accord with the decisions of this Court. It is well-settled that the remedies of an employee covered by the LHWCA and those of a seaman are mutually exclusive. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212, n. 12, 92 S.Ct. 418, 425, n.12, 30 L.Ed.2d 383 (1971); *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045 (1946); *Norton v. Warner Co.*, 321 U.S. 565, 570, 64 S.Ct. 747, 750, 88 L.Ed. 931 (1944). The decision of the court below was nothing more than a reiteration of the clear line of demarcation established by this Court in *Swanson* between the class of workers entitled to seamen's remedies and those whose remedies fall under the LHWCA. There, in denying a traditional harbor worker status as a seaman this Court stated:

We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery [provided by the Jones Act] only such rights to compensation as are given by the Longshoremen's Act.

328 U.S. at 7.

Giving careful and correct analysis to the history of the LHWCA and this Court's jurisprudence, the court below concluded the obvious. A traditional harbor worker such as Petitioner whose occupation is expressly listed as one within the coverage of the LHWCA may not claim Jones Act status. That conclusion is certainly one consistent with (1) this Court's opinion in *Swanson*, (2) the

original LHWCA, (3) the LHWCA as amended and expanded in 1972, and (4) this Court's express approval of that expansion. *See Northeast Marine Terminal v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977); *Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983).

The decision below is also consistent with reality. In this Court, Petitioner claims that he is not a longshore worker but one who "from the outset [has] sought his remedy" under the Jones Act. In fact, from the outset Pizzitolo has been paid benefits as a longshore worker under the LHWCA. Moreover, the present litigation was not instituted until 19 months after Petitioner's accident, a period during which Petitioner was provided medical care and weekly payments all under the LHWCA. And so far as Respondent knows, Petitioner continues to receive those benefits now.

Finally, the decision below properly applies the well-settled "mutually exclusive" principle. *See e.g. Balfer v. Mayronne Mud & Chemical Co.*, 762 F.2d 432 (5th Cir. 1985); *Buras v. Commercial Testing & Engineering Co.*, 736 F.2d 307 (5th Cir. 1984); *Thomas v. Peterson Marine Service, Inc.*, 411 F.2d 592 (5th Cir. 1969). Accordingly, it was proper for the court below to hold that there was no reasonable evidentiary basis for the jury's finding. Indeed, the decision of the court below is nothing more than a restatement of the well-settled line of demarcation between the seaman's and the longshore worker's remedies. As one commentator has pointed out, the Fifth Circuit has a solid history of deciding seaman status issues. *Robertson*, "Current Problems In Seaman's Remedies: Seaman

Status, Relationship Between Jones Act and LHWCA, and Unseaworthiness Actions By Workers Not Covered by LHWCA'', 45 La.Law Rev. 875, 877-892. And, the Fifth Circuit Court of Appeals has, in the challenged decision, taken an approach which neither ignores any mandate of this Court, nor misinterprets the intent of Congress. Certiorari should be denied.

III. The Decision of the Court of Appeals is Correct under the Robison Test

Among Petitioner's arguments is one that the Court of Appeals was incorrect in failing to use its traditional analysis to determine whether there was a reasonable evidentiary basis for the finding that he was a seaman. However, even when applying such an analysis, the result reached by the Court of Appeals is plainly correct.

In *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959), the Fifth Circuit Court of Appeals analyzed the various decisions of this Court on the issue² and homogenized them into its time-honored test for seaman status. Under the *Robison* formula:

² See, *Butler v. Whiteman*, 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed. 2d 754 (1958); *Grimes v. Raymond Concrete Piling Co.*, 356 U.S. 252, 78 S.Ct. 687, 2 L.Ed.2d 737 (1958); *Gianfala v. Texas Co.*, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775 (1955); *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404 (1957); *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed. 205 (1952); *Norton v. Warner Co.*, 321 U.S. 565, 64 S.Ct. 747, 88 L.Ed. 931 (1944); *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 60 S.Ct. 544, 84 L.Ed. 732 (1940).

[T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured worker was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed are the duties he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

266 F.2d at 779. The two prongs of this test are conjunctive; both must be met. In the instant case, Pizzitolo failed to meet the first prong; therefore, there was no evidentiary basis to support his claim of seaman status. And, although the Court below did not use the *Robison* analysis in reaching its results, its decision is, nonetheless, correct and well supported by *Robison* and its progeny.

In order to fulfill the requirement of permanency or substantiality, it was Pizzitolo's burden of proving that he performed a significant part of his work aboard a vessel or vessels with at least some degree of regularity and continuity. *Barrett v. Chevron U.S.A. Inc.*, 781 F.2d 1067, 1074 (5th Cir. 1986), (en banc). The necessary relationship has been described as one "evincing a vessel relationship that is substantial in point and time and not merely spasmodic." *Id.* at 1074, quoting *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240, 247 (5th Cir. 1983). The injured worker must have "more than a transitory connection" with a vessel or group of vessels. *Id.* Furthermore, incidental and temporary duty aboard a vessel is insufficient to fulfill the substantiality requirement. *Billings v. Chevron U.S.A. Inc.*, 618 F.2d 1108, 1110 (5th Cir. 1980); *Keener v. Transworld Drilling Co.*, 468

F.2d 729, 732 (5th Cir. 1972). Fortuitous and random assignments to work aboard vessels are insufficient to render a worker a seaman. *Buras v. Commercial Testing & Engineering Co.*, 736 F.2d 307, 310 (5th Cir. 1984); *Kirk v. Land & Marine Applicators*, 555 F.2d 481, 483 (5th Cir. 1977).

Moreover, where the worker's duties aboard vessels are only incidental to his primary land-based responsibilities, or where such duties are irregular and fortuitous, the worker is not a seaman. *Wallace v. Oceaneering International*, 727 F.2d 427, 434 (5th Cir. 1984). Personnel who are primarily shoreside or landbased workers and whose tasks aboard a vessel are an incidental or casual part of their overall tasks are not seamen. See, e.g., *Bouvier v. Krenz*, 702 F.2d 89 (5th Cir. 1983); *Billings v. Chevron U.S.A. Inc.*, 618 F.2d 1108 (5th Cir. 1980); *Guidry v. Continental Oil Co.*, 614 F.2d 447 (5th Cir. 1981); *Fazio v. Lykes Bros. S.S. Co.*, 567 F.2d 301 (5th Cir. 1978); *Bazile v. Bisso Marine*, 606 F.2d 101 (5th Cir. 1979); *Jones v. Mississippi Grain Elevator Co.*, 703 F.2d 108 (5th Cir. 1983); *Buras v. Commercial Testing & Engineering Co.*, 736 F.2d 307 (5th Cir. 1984); *White v. Valley Line Co.*, 736 F.2d 304 (5th Cir. 1984). Moreover, those who come aboard a vessel or vessels for isolated pieces of work are not seamen. *Bertrand*, 700 F.2d at 246; *White*, 736 F.2d at 306.

In the instant case, it is uncontested that the electricians, including the Petitioner, went aboard a vessel to perform a specific task, then upon completion of the task received another assignment from the foreman of the electrical crew. The task itself could take one hour or three hours or one day or up to three days. However, when the task was completed, Petitioner was assigned to other tasks

either on the shore or on the dock of Electro-Coal's plant. No more than 25 percent of Pizzitolo's total time at work was spent doing vessel repairs. Not insignificantly, Pizzitolo's accident occurred on the dock.

On the issue of substantiality, the percentages of time which Pizzitolo spent working aboard vessels is a relevant consideration. *Munguia*, 768 F.2d at 651; *Barrett*, 781 F.2d at 1076; *Bouvier*, 702 F.2d at 91; *Abshire v. Seacoast Products, Inc.*, 668 F.2d 832, 835 (5th Cir. 1982). In this case, at least 75 percent of the plaintiff's work was shore-based and consisted of the repair of electrical equipment on land. The Fifth Circuit has yet to hold that *any* worker who spent 25 percent or less of his time working aboard vessels fulfills the substantiality requirement for seaman status. For example, in *Barrett*, the Fifth Circuit held that an injured welder's helper was not a seaman. The plaintiff was a member of a welding crew assigned to perform welding operations on a caisson located in an oilfield in the Gulf of Mexico. During the course of his employment, he performed 70 to 80 percent of his work on platforms and no more than 20 to 30 percent of his work on vessels. The Fifth Circuit, *en banc*, determined that the plaintiff did not perform a substantial part of his work aboard a vessel or fleet of vessels and, thus, was not a seaman.

Given this well-settled law, the holdings of the District Court and the Court of Appeals were both predictable and proper. There was simply no evidentiary basis for the jury's finding of seaman status. Instead, the Courts below properly looked to the characteristics of Petitioner's total employment in terms of its nature and the location in which it was carried out, *Barrett*, 781 F.2d at 1075, and properly considered all of the circumstances of Petitioner's em-

ployment to determine the relation of his vessel-related activities to his total responsibilities, *Longmire v. Sea Drilling Corporation*, 610 F.2d 1342, 1347 (5th Cir. 1980). The circumstances in this case lead solely and directly to the conclusion that Pizzitolo was a harbor worker/ship repairman and not a seaman.

O

CONCLUSION

Respondent, Electro-Coal Transfer Corporation, respectfully submits that the petition for writ of certiorari filed by Nicholas R. Pizzitolo should be denied. Alternatively, Respondent submits that summary affirmation of the decision below is appropriate.

Respectfully submitted,

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**APPENDIX: LISTING OF PARENT, SUBSIDIARY
AND AFFILIATE COMPANIES OF ELECTRO-COAL
TRANSFER CORPORATION, PURSUANT TO
SUPREME COURT RULE 28.1**

Electro-Coal Transfer Corporation
Teco Energy, Inc.
Teco Finance, Inc.
Teco Investments, Inc.
Tampa Electric Company
Teco Diversified, Inc.
Teco Properties Corporation
Teco Coal Corporation
Teco Transport & Trade Corporation
Teco Power Services Corporation
Termco, Inc.
Catliff Coal Company
Rich Mountain Coal Company
Gulfcoast Transit Company
Mid-South Towing Company
Teco Towing Company
G C Service Company, Inc.